Office-Supreme Court, U.S.
FILED
APR 27 1965
JOHN F. DAVIS, CLERK

# IN THE SUPREME COURT OF THE UNITED STATES
## OCTOBER TERM, 1964

No. 95

VICTOR LINKLETTER, *Petitioner,*

VS.

VICTOR G. WALKER, WARDEN, *et al.*, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## MOTION FOR LEAVE TO FILE AS ADDITIONAL AUTHORITY AN APPENDIX TO PETITIONER'S BRIEF PRINTED IN SUBSTANTIAL CONFORMITY WITH THE REQUIREMENTS OF RULE 39 (1).

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Comes now your Petitioner, Victor Linkletter, through his attorneys of record and shows unto this Honorable Court as follows:

1. During the oral argument in this case, Petitioner's attorney referred the Court to an article then in galley form to be printed in the **Virginia Law Review** by Thomas S. Currier entitled "Time and Change in Judge-made law: Prospective Overruling." Petitioner's attorney is of the opinion that said article is relevant and material authority for consideration by this Honorable Court of the questions presented in this petition for certiorari.

2. The citation for this authority is: Currier, "Time and Change in Judge-made Law, Prospective Overruling",

51 Va. Law Rev. 201, but said Law Review Issue will not be distributed for several weeks.

3. Said Article is presently in re-print form and is printed in substantial, though not exact, conformity with Rule 39 (1), a copy of which is attached to this Motion.

4. Petitioner is a pauper and is without funds to pay the costs of printing said appendix in exact conformity with Rule 39 (1).

WHEREFORE, Petitioner respectfully moves this Honorable Court for leave to file this Motion together with the attached appendix as additional authority in the nature of an appendix to Petitioner's brief.

Respectfully Requested,

Truman Hobbs

Euel A. Screws, Jr.

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Motion together with the attachment hereto on the Hon. Jack P. F. Gremillion, Attorney General of the State of Louisiana, Attorney for Respondent, and on Hon. Michael Juviler, Assistant District Attorney, New York County, 155 Leonard Street, New York, New York, attorney for the **Amicus Curiae**, The National District Attorney Association by mailing a copy to them at the above addresses, First Class Air Mail, postage prepaid, on this 23 day of April, 1965.

Euel A. Screws, Jr.

Attorney for Petitioner

VIRGINIA LAW REVIEW

VOLUME 51 MARCH 1965 NUMBER 2

## *ARTICLES*

# TIME AND CHANGE IN JUDGE-MADE LAW: PROSPECTIVE OVERRULING

*Thomas S. Currier*•

*After a brief consideration of the nature and history of prospective overruling—that is, the limiting of a new precedent to affect only situations which arise after the new decision is made—the author considers the propriety of its use in federal courts, proposes criteria for determining whether new precedents should be applied retroactively in a broad range of situations, and concludes with a detailed consideration of new precedents expanding fourteenth amendment protection in criminal proceedings. The author stresses that, even in a society reconciled to profound and continuous change, there are thoroughly modern values, both practical and psychological, that frequently require that judicial change, at least, be "absolute" in the sense that it be allowed to reach past as well as future events.*

"Time makes ancient good uncouth"

James Russell Lowell, *The Present Crisis*

THIS Article is ultimately concerned with the following bit of melodrama.

See in your mind's eye two men, cellmates. It is the late afternoon of yet another unamusing day in prison, and both men are suitably downcast. Each faces a possible seven years of servitude. Enter the first prisoner's lawyer. "Good news, Arnold, my boy! Your conviction has been reversed, because of that illegally seized evidence the state used at your trial."

• Associate Professor of Law, University of Virginia. LL.B., 1956, Tulane University. The author wishes to express appreciation and make known his indebtedness to Mr. Anthony R. Blackshield, Lecturer, Department of Jurisprudence and International Law at the University of Sidney, and Visiting Associate Professor of Law at the University of Virginia during the fall semester of 1964-1965, for his valuable suggestions and criticism.

The other prisoner, who has become something of a law buff during the pendency of his appeals, breaks in: "You mean they decided to give *Mapp v. Ohio*[1] retroactive effect?"

The lawyer says a little nervously, "No, Aaron, but Arnold's trial was held after yours, and his appeal had not become final by the time *Mapp* was decided. With that exception,[2] the Supreme Court has just decided to make *Mapp* prospective only. It's terrible luck for you—I can't tell you how sorry I am."

Aaron, who has not been studying the law long enough for the intricacy and importance of balancing and line-drawing to have been borne in upon him fully, makes a series of rude remarks. Then: "We were alleged to have been in on the same robbery. We were together when the evidence was seized. We both protested the seizure, and that we were innocent. What's the deal?"

The lawyer explains that the deal is that Aaron's separate trial happened to be held before Arnold's, and his appeal was heard sooner. He had not petitioned for certiorari to the Supreme Court, so his conviction became final. Arnold is to go free, he explains, because as a matter of simple luck his conviction had not become final as of the date of the *Mapp* decision. Arnold and his lawyer walk off, leaving Aaron rattling his cup against the bars and expressing his views about the majesty of a system of law that takes two people in literally identical circumstances, puts one of them in jail for seven years, and lets the other go free.

Perhaps I have posed the situation in too light a vein. To take a little of the fun out of it, suppose that the men have been convicted of a capital crime. One goes free, the other goes to the gas chamber. His only consolation as the green door is dogged tight is to mull over his final chat with his lawyer a few minutes before, a chat that might have gone something like this:

"As your friend and as an officer of the court, Aaron, I would like at this serious time to ask you to consider a few nice points. First, you mustn't feel so badly about this disparity of treatment, because the new rule which set your cellmate free was not made with a view to defendants at all. Rather, it was designed to deter the police from making illegal seizures. Since the rule was not made with your interests

1. 367 U.S. 643 (1961).

2. See, *e.g.*, Ker v. California, 374 U.S. 23 (1963), which applied the *Mapp* rule on appeal, but, finding that it had been complied with, affirmed the conviction. The *Mapp* case itself applied the new rule on appeal in reversing Miss Mapp's conviction.

in mind, it is proper to decide how to apply it—where to draw the line—without considering this disparity of treatment, distasteful as it is to all of us. As to your blunt suggestion, 'That ain't how American courts are supposed to work,' you are quite wrong. The result was based on traditional and careful balancing of the *relevant* interests; in the end, convenience of judicial and criminal administration won the day.

"I wish I could impress upon you that it was purely incidental that you lost, since the new rule never really involved you at all. It is quite true that your cellmate went free because he had a 'constitutional right' which had not been in existence at the time of your conviction. But that terminology is misleading. He was given a personal, constitutional right solely because that was the only way we could get the police to stop illegal seizures. Illegal evidence has just as great probative value as any other. Thus you are just as likely to have been properly found guilty on the basis of *that* evidence as any other. You see, there are other things about illegal seizures that we don't like—invasion of privacy, intimidation, and the like—and we just hit at the thing as best we could.

"Now they're going to be coming for you in a minute, but I do want to be sure you understand this last part before you go. You say to me, 'That's a lot of hogwash. If it's a constitutional right for him, it's a constitutional right for me. I am getting abused,' or words to that effect. May I say that that's a surprisingly sophisticated approach for one of your modest education to take. In former times some very able men have said just that, but now we know that in fact the Constitution is not always the same. Judges change it; they reinterpret it to better fit the times. In a sense, you see, they are like legislators. Now this is my point. Since they are in effect performing a quasi-legislative task, it is proper for them to say, as Congress almost always does, that the new rule shall only apply to future transactions. Thus people who rely on the old rules are not disappointed, stability is fostered, and so on.

"You tell me, 'The Constitution says what's right, and that's the same for me as for the next guy.' Now that's interesting, you know; quite an insight in a way. But what you fail to see is that what is 'right' gradually changes also, and—to the extent that the Constitution embodies our fundamental notions of what is right—the Constitution changes too. What may shock the conscience of the country today may have been entirely acceptable in 1930. Thus a man may have been *fairly* convicted in 1930 and be in jail today, even though the trial wouldn't stand up to modern standards. But you can see that he can hardly say his trial wasn't fair, for we just said it *was*. It's just that the effectua-

tion of the change seems a bit sudden when the Court engages in prospective overruling. You'll remember we talked about that.

"Prospective overruling is a simple matter of facing up to the reality that things *change*, even fundamental things, and effecting change in a deliberate and rational manner rather than pretending that things were always the way they are now. Admittedly, change *can* seem abrupt when courts do this, but you mustn't think of yourself as a victim of the practice. You're not a victim; it's just that your cellmate Arnold—fortuitously, I admit—is a *beneficiary*. If I could give you just one piece of advice to take with you, I would urge you not to attempt to universalize your sense of right and wrong.

"Well, Aaron, here are your friends, and I must be running along. May I say how very sorry I am that things had to work out this way. Better luck in a better world."

Something very much like this bit of gallows humor could have taken place had the Fourth Circuit[3] been persuaded that *Mapp* should be given only prospective effect, as many have urged.[4] It may still happen if other circuits[5] pursue the line they have already taken, or if the Supreme Court follows their lead. It is the purpose of this Article to consider prospective overruling generally, to urge that it is an entirely proper device in a great many circumstances, but to demonstrate that it is not appropriate in cases like *Mapp* where constitutional rights and criminal sanctions are involved. In other areas stability and the right to rely on existing law may well be controlling but, in the area of individual liberties, like treatment of persons in like circumstances is the overwhelming consideration.

This is so primarily because the great mass of people—and not just simple folk like Aaron—*do* "universalize" their notions of right and wrong. They *are* capable of being outraged at old wrongs—the burning of witches, say, the beating of slaves—and will not be put off with the

3. See Hall v. Warden, 313 F.2d 483 (4th Cir.), *cert. denied*, 374 U.S. 809 (1963).

4. For the most compelling arguments see Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 909-12 (1962). Both are discussed at some length in Part IV of this Article.

5. United States *ex rel.* Angelet v. Fay, 333 F.2d 12 (2d Cir.), *cert. granted*, 379 U.S. 815 (1964) (No. 578); Sisk v. Lane, 331 F.2d 235 (7th Cir. 1964); United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *cert. granted*, 377 U.S. 930 (1964) (No. 1125, 1963 Term; renumbered No. 95, 1964 Term); Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963).

explanation that the wrongdoers were upright men affording the due process of their day and meaning only to serve the highest good. It is a flaw of moral perception, perhaps, to apply our morality retroactively, but it is a powerful phenomenon and can lead to a dangerous contempt for a system of that does not take it into account.

Happily, there are strong indications that the Supreme Court shares this flawed moral perception. Consider the case of *Fay v. Noia*,[6] in which the Supreme Court extended the right to be heard on habeas corpus so long as presently available state remedies were exhausted, regardless of what remedies, now lost, had been foregone in the past. Two of three men convicted of felony-murder had been released through habeas corpus proceedings. The third, Noia, was held to be ineligible since he had not appealed his state conviction. In reversing this holding, the Supreme Court concluded:

> Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison. Noia, no less than his codefendants Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own; but surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy.[7]

The question of the effect to be given to the *Mapp* precedent is particularly difficult and urgent. Having indicated my conclusions on this specific problem, I propose to consider the prospective limitation technique in general, to suggest an approach for, and the relevant values to be considered in, all overruling situations, and, finally, to apply the approach and the values in habeas corpus cases and particularly in the *Mapp* case.

## I. Background and Techniques of Prospective Overruling

It is the common-law tradition that judicial precedents normally have retroactive as well as prospective effect.[8] That is, what a court

6. 372 U.S. 391 (1963).

7. *Id.* at 441.

8. Oliver Wendell Holmes, Jr., author of the *The Common Law*, was speaking as Mr. Justice Holmes of the United States Supreme Court when in 1910 he wrote, "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective

holds to be the law today for the litigants before it, is the law for persons who come into the court hereafter, even though the alleged wrong was committed before today's decision, and today's decision declares illegal what appeared to be legal when it was done. Legislation, on the other hand, generally has only prospective effect. That is, it applies only to transactions that occur after the final passage of the statute. The classical explanation for retroactive operation of judicial precedent, articulated by Blackstone, was that the law exists independent of judicial decisions. It is, in Holmes' familiar phrase, a "brooding omnipresence," absolute and unchanging. The judge's function is not to make the law but to find it, not to "pronounce a new law, but to maintain and expound the old one"; and an overruling decision signifies not that the decision overruled "was *bad law*, but that it was *not* law; that is, that it is not the established custom of the realm, as had been erroneously determined." [9]

The approach seems a bit willful to the modern mind, but made perfect sense in a time that saw the world as shot through with certainty, illuminated with Reason, Divine Design, or the ordering hand of a Clockmaker God. Predictably, in an age that is at home with the melting clocks of Salvador Dali and the besetting flux of Henry Adams, the Blackstonian view of judicial decision-making has been generally disavowed.[10] Even so, some decisions continue expressly to reflect his thesis,[11] and, for whatever reason, the great majority of overruling

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operation for near a thousand years." [Dissenting in Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910).] There is a certain grandeur in the sweep of Holmes' phrasing, but the statement remains a fair description of one of the central principles in our received learning on the common law.

Note, 71 YALE L.J. 907 (1962). (Footnote omitted.)

Because retroactive operation of decisions is inherent in the common-law system, the hardship which it sometimes produces is ordinarily accepted as a necessary evil.

Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions*, 47 HARV. L. REV. 1403 (1934).

9. 1 BLACKSTONE, COMMENTARIES *69-70. For further exposition of the theory, see Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 907-08 (1962), and authorities there cited.

10. See, e.g., Covington, *The American Doctrine of Stare Decisis*, 24 TEXAS L. REV. 190, 200-04 (1946); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 4 (1960); Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121, 122 (1940); Spruill, *The Effect of an Overruling Decision*, 18 N.C.L. REV. 199 (1940).

11. E.g., Hall v. Warden, 313 F.2d 483, 495 (4th Cir.), *cert. denied*, 374 U.S. 809 (1963):

It must be recognized that, since Weeks and Wolf, there had been no change in the constitutional requirements of due process considered and found con-

decisions are given retroactive effect, usually without comment on the possibility of taking another approach. A majority of the United States Supreme Court, for instance, has yet to limit an overruling decision expressly to prospective effect.

Early attachment to the retroactive-declaratory theory reveals itself in holdings that an overruling decision, although retroactive in operation, does not violate the ex post facto[12] or the contract[13] clause of the Constitution. The declaratory approach was also reflected, indirectly, in early cases giving retroactive effect to decisions invalidating or reinterpreting statutes.[14] Similarly, the declaratory theory is reflected in the doctrine of *Swift v. Tyson*.[15] Since state courts were merely finding

trolling in Mapp. If the protections are there now, were they not present when Wolf was decided and were they not present when Hall was tried, convicted and sentenced? An affirmative answer would appear to be inescapable.

12. Frank v. Mangum, 237 U.S. 309, 343-44 (1915); *cf.* Ross v. Oregon, 227 U.S. 150 (1913) (decision in case of first impression).

In *Mangum* objection was raised, in habeas corpus proceedings, to a ruling by the Supreme Court of Georgia that grounds were available at the time of a trial for objecting to the defendant's absence at the reception of the verdict. Defendant alleged that this ruling was based on a decision, made after the event, which was inconsistent with existing decisional law. 237 U.S. at 325, 343-44. Without going into the cases or considering the question of reliance, the United States Supreme Court simply held:

> Assuming the inconsistency [between the controlling case at the time of sentencing and the later case relied upon by the Georgia court in ruling that the objection was available and thus waived], it is sufficient to say that the . . . [ex post facto clause], as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts.

237 U.S. at 343-44. The Court did not consider whether the action of the Georgia court violated the due process clause.

13. Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924). *But see* Douglass v. County of Pike, 101 U.S. 677 (1879). Holding that a decision overruling a judicially settled interpretation of a statute, under which contractual rights had been established, could not be applied to the case at bar, the Court stated: "[W]e cannot give [the overruling decision] . . . retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing." *Id.* at 687.

14. Thus in Norton v. Shelby County, 118 U.S. 425 (1886), suit had been brought on bonds issued by a board of commissioners created by a Tennessee statute. After issuance of the bonds, but before suit, the statute was construed for the first time by the state supreme court, in other litigation, and held to violate the state constitution. Thus in the *Norton* case there was no question of reliance on a prior decision. The Supreme Court of the United States rejected the position that the bonds were valid as acts of *de facto* officers of the county. To the contention "that a legislative act, though unconstitutional, may in terms create an office" for the purpose of the *de facto* doctrine, Mr. Justice Field responded that "it is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; . . . it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* at 442.

15. 41 U.S. (16 Pet.) 1 (1842).

the common law rather than making it, federal courts regarded themselves as free to find the common law of a state independently of the state courts. In the words of Mr. Chief Justice Story, decisions

> are, at most, only evidence of what the laws are, and not of themselves laws. . . . [T]he state tribunals are called upon to perform like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.[16]

Mr. Justice Holmes attacked *Swift v. Tyson*, and the declaratory theory, in his famous dissent in the *Black & White Taxicab* case:

> It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. . . . The common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.[17]

In an earlier opinion,[18] Mr. Justice Holmes had recognized that the logic of *Swift v. Tyson* was in basic conflict with the practice of limiting judicial decisions to prospective effect.

For all that the traditional declaratory approach may have had deep roots in fundamental notions of the nature of law, there were a few cases, even in the years when the declaratory view held full sway,

16. *Id.* at 18-19.

17. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533-34 (1928).

18. Dissenting in Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910), Mr. Justice Holmes said of state law cases in which the Court had refused to apply state court decisions retroactively:

> In those cases the court . . . [recognized] the fact that decisions of state courts of last resort make law for the State. The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law. . . . [These cases stand] on the ground that the state decision made the law for the State, and therefore should be given only prospective operation when contracts had been entered into under the law as earlier declared.

*Id.* at 371.

where the abstract notion compelled too harsh a result. Classical theory was put aside in these cases, and substantial justice done by giving the overruling decision prospective effect only. Notable among them is *Gelpcke v. City of Dubuque*,[19] a diversity case in which the Supreme Court of the United States refused to give retroactive effect to an overruling decision of the Supreme Court of Iowa that had held certain municipal bonds invalid. The earlier Iowa decision was applied because the plaintiffs in the federal action had purchased their bonds in reliance upon it. The Court stressed the reliance of the bondholders; the opinion spoke of "the plainest principles of justice," and made no mention of the dogma that judicial decisions are necessarily retroactive. "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." [20]

19. 68 U.S. (1 Wall.) 175 (1863), discussed in Read, *The Rule in Gelpcke v. Dubuque*, 9 AM. L. REV. 381 (1875); Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311 (1891).

20. 68 U.S. (1 Wall.) at 206. While the substantive law question in *Gelpcke* was the constitutional authority of the City of Dubuque to issue the bonds in question, the more famous aspect of the decision is, of course, its aggravation of the problem of variance between result of litigation in state and federal courts under *Swift v. Tyson*: "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." *Id.* at 206-07.

The result in *Gelpcke*, and other municipal bond cases in the federal courts that followed, can be attributed partially to the influence of *Swift v. Tyson*, and to that extent *Gelpcke*'s significance as an inroad on the Blackstonian theory of retroactivity is diminished. Even prior to the *Erie v. Tompkins* era, federal courts were reluctant to depart from state court decisions as to whether a state statute violated the state constitution. Nonetheless, the Court in *Gelpcke* regarded itself as free to evaluate the Iowa statute independently: "It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority." *Id.* at 205-06. But the dissent in the *Gelpcke* case was cast in Blackstonian terms: "I understand the doctrine to be in such [overruling] cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859." *Id.* at 211.

For a discussion of the relation of *Swift v. Tyson* to these early Supreme Court cases on the problem of retroactivity, see Kuhn v. Fairmont Coal Co., 215 U.S. 349, 361 (1910).

In a later municipal bond case coming through the federal courts, the Supreme Court stated: "The question presented . . . is not so much whether these late [overruling] decisions are right, as whether they should be followed in cases having reference to bonds put out and in the hands of innocent purchasers when they were announced." Douglass v. County of Pike, 101 U.S. 677, 679 (1879). For a discussion of the municipal bond cases see Note, 71 YALE L.J. 907, 917-20 (1962).

Although there were other early cases in which the courts in fact refused to give retroactive effect to their decisions,[21] prospective overruling was not expressly advocated as a distinct and proper method of deciding cases until well into this century.[22] Once the theory was articulated, however, it received wide and generally enthusiastic attention.[23]

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21. *E.g.*, Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1892); Bingham v. Miller, 17 Ohio 445, 448-49 (1848); see Note, 71 YALE L.J. 907, 916-20 (1962). See also Levy, *supra* note 10, at 8-9.

*Bingham* was an early example of the technique of prospective limitation, not recognized contemporaneously as such. For a discussion see Note, 71 YALE L.J. 907, 916-17 (1962). The Ohio court decided that the legislature had no power to grant legislative divorces, but simultaneously refused to hold invalid the legislative divorce that was in issue because of the impact this would have on the status of progeny of second marriages already contracted.

In Douglass v. County of Pike, 101 U.S. 677, 687 (1879), for instance, the Court used language that would free overruling decisions involving statutory interpretation from the declaratory-retroactive stricture of Blackstone's view: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative amendment." While Blackstone was speaking of the common law—"the custom of the realm," BLACKSTONE, *op. cit. supra* note 9—the logic of his position is equally applicable to statutory construction. If, in interpreting a statute, courts only declare its meaning, then a new decision declaring a different meaning should, upon Blackstone's theory, indicate that the overruled interpretation was erroneous and never the law. In fact, Mr. Justice Black's dissent in James v. United States, 366 U.S. 213 (1961), discussed in Part II *infra*, applies Blackstone's view to statutory interpretation and regards it as a salutary limitation upon judicial legislation.

22. The origin and development of the idea are traced in detail in Levy, *supra* note 10, at 7-25. For early expositions of the idea see Wigmore, *Editorial Preface* to SCIENCE OF LEGAL METHOD at xxxvii-viii (Modern Legal Philosophy Series No. 9, 1917); Address by George F. Canfield, Annual Meeting of the South Carolina Bar Association, Aug. 4, 1917, in 24 S.C.B.A. REP. 17-21 (1917); Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COLUM. L. REV. 230, 251 (1918); WIGMORE, PROBLEMS OF LAW: ITS PAST, PRESENT, AND FUTURE 79-82 (1920); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 147-49 (1921); Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B.A.J. 180, 182 (1931); Address by Chief Judge Cardozo, New York State Bar Association, Jan. 22, 1932, in 55 N.Y.S.B.A. REP. 263, 294-96 (1932); Kocourek & Koven, *Renovation of The Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 995-96 (1935); LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 109-11 (1938).

For early opposition to the idea of prospectively limiting overruling decisions, see Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426-27 (1924); Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions* 47 HARV. L. REV. 1403 (1934).

23. See note 22 *supra*. See generally LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 299-305 (1960).

Mr. Justice Cardozo gave prospective limitation a considerable boost in 1932, in *Great Northern Railway v. Sunburst Oil & Refining Co.*[24] The Supreme Court of Montana had previously held, in *Doney v. Northern Pacific Railway*,[25] that upon reduction of intrastate freight rates by the State Railroad Commission, shippers who had paid the old rate, pursuant to the railroad's published tariff approved by the Commission, were given by the applicable statute the right to recover the excess payments. In *Sunburst*, the Montana court overruled the *Doney* decision and announced that the statute did not create such a right. Utilizing the prospective limitation approach, however, the court held that the *Doney* rule should nonetheless be applied to the *Sunburst* case and to other contracts of carriage entered into in reliance upon the *Doney* decision.[26] Thus Sunburst was permitted recovery under the old rule. The Supreme Court of the United States held that the railroad had not been deprived of property without due process of law by the Montana court in this situation. In solving the problem of retroactive operation of judicial decisions, "the choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature."[27] Thus as far as state courts are concerned the United States Constitution neither precludes nor compels prospective limitation.

While it has been objected that, after a flurry of interest in the 1930's, the courts have been unreasonably timid about prospective limitation,[28] the technique has been adopted in many cases in state courts.[29] Prospective limitation has been utilized less frequently in the federal courts, in part because the Supreme Court has not directly passed on its validity under the federal constitution. But federal courts have used the technique in a number of cases, and upon analysis, doubts of its availability in federal courts appear to be ill-founded.[30]

Proponents of prospective limitation urge that an appellate court performs two distinct functions in deciding a case before it: disposing of that case and shaping the decisional law. They argue that since the factors that should control these two functions may be fundamentally

24. 287 U.S. 358 (1932), *affirming* 91 Mont. 216, 7 P.2d 927 (1932). Compare Montana Horse Prods. Co. v. Great No. Ry., 91 Mont. 194, 7 P.2d 919 (1932).

25. 60 Mont. 209, 199 Pac. 432 (1921).

26. 91 Mont. at 220-21, 7 P.2d at 929.

27. 287 U.S. at 365.

28. Levy, *supra* note 10, at 2-3.

29. See notes 34-41 *infra* and accompanying text, Part III *infra*.

30. The problem is discussed in Part II *infra*.

different, it is sensible for the court to consider them separately.[31] When precedent is under attack, an appellate court should give attention first to the rule under attack, and whether it ought to be overruled. If it decides to overrule, it should then decide whether or not the new rule should be applied in the disposition of the case at bar.

The basic premise of this theory is that courts obviously do make law in the process of deciding cases. "Judges may be conservative, modest, and self-effacing," as one commentator has put it, "but the substantive law never got secreted from the interstices of procedure (in Maitland's happy phrase) without their aid."[32] Advocates of prospective overruling urge that, since the courts do in fact perform this distinct and broader function, they should do it more deliberately. They conclude that courts should feel free to weigh the precedential or "legislative" effect of their decisions unburdened by any concern that changing the established rule—albeit for the better—will necessarily impose hardship or injustice on the litigants in the case at bar, or on others who have acted in reliance upon the precedent to be rejected. Thus hard cases need not make, nor perpetuate, bad law. The desired result is that courts will then revise decisional law more readily, more effectively, and more fairly, when faced with an outmoded or unsound precedent upon which broad reliance has been placed.[33]

Courts that have accepted these basic propositions have reached varying results in performing the second function described above—in deciding whether a particular overruling decision should be given retroactive or only prospective effect. The various techniques of prospective limitation, and some consequences of their use, can be studied in a series of cases dealing with sovereign immunity. The doctrine of sovereign immunity from tort liability has been subjected to vigorous and sustained

31. See Levy, *supra* note 10, at 13, quoting passages from Address by Chief Judge Cardozo, New York State Bar Association, January 22, 1932, in 55 N.Y.S.B.A. Rep. 263, 296-97 (1932):

> What the court is saying, as Cardozo phrased it, is this: "The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice, however, that any one trusting to it hereafter will do so at his peril."
>
> . . . .
>
> If this course were pursued, the fruits would be incalculably rewarding: "Much of the evasion, the pretense, the shallow and disingenuous distinctions too often manifest in opinions—distinctions made in the laudable endeavor to attain a just result while preserving a semblance of consistency—would disappear from our law forever. . . ."

32. Levy, *supra* note 10, at 3.

33. See Kocourek & Koven, *supra* note 22, at 990-99.

attack in the courts in recent years, and with a fair degree of success. To a number of courts, these cases seemed clearly to call for prospective limitation, most often because of what the courts spoke of as an unusual interest in protecting "reliance." Normally, of course, it cannot be said that a tortfeasor has relied upon the substantive law in negligently injuring another. But a question of reliance is raised by a decision overruling immunity from liability. As stated by the Supreme Court of Illinois in *Molitor v. Kaneland Community Unit District No. 302*:

> We do not suggest that the tort itself was committed in reliance on the substantive law of torts, *i.e.*, the bus driver did not drive negligently in reliance on the doctrine of governmental immunity, but rather that school districts and other municipal corporations have relied upon immunity and that they will suffer undue hardship if abolition of the immunity doctrine is applied retroactively. In reliance on the immunity doctrine, school districts have failed to adequately insure themselves against liability. In reliance on the immunity doctrine, they have probably failed to investigate past accidents which they would have investigated had they known they might later be held responsible therefor.[34]

Courts have reached various conclusions as to whether reliance of this type is an adequate cause, when overruling an immunity from tort liability, to limit the overruling decision to prospective effect. The Supreme Court of California felt reliance was unjustified in light of recent statutes and judicial decisions restricting the immunity doctrine, and overruled the doctrine retroactively.[35] The California legislature, apparently disagreeing, promptly enacted a moratorium barring tort actions against governmental entities that would have been barred prior to the overruling decision.[36] Its purpose was to afford time for a comprehensive study of the problem; and this resulted in recommendations for legislative reform[37] that were enacted by the legislature in 1963.[38]

34. 18 Ill. 2d 11, 28-29, 163 N.E.2d 89, 97-98 (1959).

35. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 221, 359 P.2d 457, 463, 11 Cal. Rptr. 89, 95 (1961):

> Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. . . . Thus . . . we make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend.

36. Cal. Stat. 1961, ch. 1404.

37. 4 California Law Revision Commission, Reports, Recommendations and Studies 801-1611 (1963); see Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 Stan. L. Rev. 163 (1963).

38. Cal. Gov't Code §§ 810-996.6. Moreover, this addition to the Code was made fully retroactive. Cal. Stat. 1963, ch. 1681, § 45, at 3228.

The Supreme Court of Illinois in the *Molitor* case, on the other hand, postponed the general effective date of its newly announced rule of municipal tort liability to causes of action arising after the date of decision to enable uninsured municipalities to obtain liability insurance.[39] And the Supreme Court of Minnesota postponed its overruling in order to give the legislature a last chance to handle the job, conceding "that the flexibility of the legislative process—which is denied the judiciary—makes the latter avenue of approach more desirable." [40] But the prod to legislative action was unmistakeable; the court was "unanimous in expressing its intention to overrule the doctrine of sovereign tort immunity," if necessary, as to school districts, municipal corporations, and other subdivisions of government, "after the next Minnesota Legislature adjourns." [41]

One final variation that requires discussion is the "reward" approach employed by the Illinois Court in *Molitor*. While holding that its decision was in general to have only prospective effect because of justifiable reliance upon its prior decision by failure to insure and failure to investigate claims, the court nonetheless decided to apply the new rule to the case before it, not because of lack of reliance in the particular case, but on grounds which, if valid, appear applicable to all instances of prospective overruling:

> At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere

39. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

A similar result has been reached in cases overruling the doctrine of charitable immunity. *E.g.*, Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960).

> In the interests of justice and fairness, in view of the new ruling and the reliance that some, albeit few, charitable, nonprofit hospital corporations may have placed on the old ruling, and may have failed to protect themselves by the purchase of available insurance, we believe the new rule should apply to the instant case and to all future causes of action arising after September 15, 1960, the date of the filing of this opinion.

*Id.* at 28, 105 N.W.2d at 14-15. See Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107, N.W.2d 292 (1961).

40. Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962).

41. *Ibid.*. The Minnesota Supreme Court seems to view this practice as an attractive alternative, for they expressed the same caveat in a more recent decision. See Jeruzal v. Jeruzal, 130 N.W.2d 473 (Minn. 1964).

> *dictum*. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.[42]

Neither the dicta argument, which is considered elsewhere,[43] nor the "reward" argument seems compelling.

The reward argument in support of the *Molitor* practice—awarding recovery to the plaintiff under the new rule, and thereby carving an exception from the prospective limitation otherwise imposed upon it—is that without such an exception incentive to attack unsound precedent would be lacking. This, like the dicta argument, was one of the objections urged against the prospective effect approach when it was first advanced.[44] Perhaps adoption of the reward technique in *Molitor* can be explained, though not justified, as an attempt to avoid these objections. But all incentive to attack a crumbling precedent is not eliminated by the prospective effect approach because, even under it, prospective limitation is not automatically the rule, and the possibility of retroactive overruling is a carrot still available to encourage litigation—assuming that this is desired.[45] Additionally, there are litigants with recurring interests in particular rules of law, who can be relied upon to attack infirm doctrine for the potential rewards that would flow from even a prospectively limited overruling decision.[46]

In any event, application of a mechanical formula that, without reference to other criteria, rewards the winning litigant in an overruling decision otherwise limited to prospective effect is undesirable for another reason. It results in substantial impairment of the value of equality, which, as Part III of this Article attempts to show, is one of the major values to be considered in determining whether precedent should be rejected, and, if so, whether the new rule should be retroactively applied.

In summary, prospective limitation appears to have been utilized clandestinely even by Blackstonian judges when the need for it was sufficiently great. The practice has been expressly advocated for almost

42. 18 Ill. 2d at 28, 163 N.E.2d at 97.

43. Part II *infra*.

44. Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426 (1924); Note, 47 HARV. L. REV. 1403, 1412 (1934); Note, 28 KY. L.J. 351, 354-55 (1940).

45. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 491 (1962); Note, 60 HARV. L. REV. 437, 440 (1947).

46. *Ibid.*

fifty years; its acceptance as a proper exercise of judicial power has increased during those years; and it is presently in use in a number of state courts, though its propriety in federal adjudication has not yet been authoritatively established. Finally, conscious experience of the practice has been fairly short; no one court, nor the courts as a whole, have had adequate experience with the practice to develop any extensive theories about it. Thus techniques vary widely; and comprehensive criteria for determining when prospective limitation is called for and should be imposed have not yet been worked out.

## II. Prospective Limitation in Federal Courts: Justiciability and Separation of Powers

Arguments have been made that the prospective limitation technique is beyond the scope of the federal judicial power authorized by article III of the Constitution, because it results in judicial pronouncements on the law that are not dispositive of the case or controversy before the court; and that use of the technique by federal courts violates the constitutional requirement of separation of powers. Each argument has a certain appeal, but neither seems to survive a close analysis. The two arguments have been separated for the discussion and analysis that follow.

### *A. Prospective Limitation Under Article III*

Critics of the prospective effect approach maintain that, if an overruling decision is prospectively limited, the overruling language is dicta;[47] and, further, that it is an advisory opinion beyond the scope of the federal judicial power enumerated in article III of the Constitution and may not be given by a court established under that article.[48] Similarly it is suggested that if the newly announced rule is applied to the case at bar, then any language indicating that the overruling decision is to have only prospective effect in other cases is also dicta, and constitutes advisory opinion beyond the constitutional power of federal courts.[49]

47. Von Moschzisker, *supra* note 44, at 426; Note, 47 Harv. L. Rev. 1403, 1412 (1934).

48. See Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 930-33 (1962).

49. See authorities cited notes 47 & 48 *supra*. This duality of the dictum objection is observed in Note, 46 Iowa L. Rev. 600, 616 (1961).

The argument confuses appraisal of what an article III court may properly do in exercising the federal judicial power with the weight that may properly be attributed to its decisions as stare decisis.[50] The former is the constitutional restriction imposed by article III that "the jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'" [51] There is an ample body of Supreme Court decisions placing cases to one side of the line or the other,[52] but there is no serious suggestion that, in a dispute which would otherwise present a case or controversy, justiciability is destroyed by the contention that precedent should be overruled—or that the overruling should be limited to prospective effect. The argument against federal use of the prospective overruling technique is rather that the constitutional restriction of federal judicial power to determination of cases or controversies prevents a federal court from considering contentions that are not dispositive of an admitted case or controversy properly before it.[53]

It is true that the limitations imposed by article III should and do influence federal courts to restrict their consideration to issues that are potentially dispositive of pending litigation. But there is an important difference between an issue that is potentially dispositive and one that ultimately turns out to be dispositive in fact; and, because of this difference, what a federal court does in disposing of a case or controversy is generally subject only to influence, and not to command, by article III. It frequently is not possible at the outset, or even midway through the course of litigation, to ascertain which issues will in fact be dispositive of the case.

An example may be in order. At conclusion of trial, a court may find all facts as alleged by the plaintiff, but conclude as a matter of law

50. It thus reflects an unfortunate marriage of what Professor Moore has called the fetish of federal jurisdiction, see 1 MOORE, FEDERAL PRACTICE ¶ 0.60[4] (2d ed. 1964), with the somewhat artificial technique developed to deliver the House of Lords from the bondage of its own prior decisions without its actually overruling them. It is one thing for Professor Goodhart to argue that admittedly germane reasoning of the House of Lords, as distinguished from the actual disposition of the case before it, is not binding precedent. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 182 (1930). It is quite another to say that federal courts exceed their constitutional powers by reducing their reasoning to written form.

51. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

52. See 6 MOORE, FEDERAL PRACTICE ¶¶ 57.11-.16 (2d ed. 1953).

53. See Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 932-33 (1962).

that the facts alleged and proved entitle him to no relief. It might have been possible for the court to reach this conclusion of law prior to trial of the factual issues, and there are procedural devices available for this purpose.[54] But the defendant need not utilize these devices; and, even if he does, the court may postpone decision of the issue of law, for one reason or another, until the factual issues have been tried and determined.[55] Thus a determination of the plaintiff's factual contentions will be necessary. They are potentially dispositive, and the court may hope to avoid a difficult question of law in the event plaintiff fails to prove his propositions of fact. In the end, the plaintiff having proved his facts, it may turn out that the law is with the defendant, so that these issues of fact are not ultimately dispositive, though they were potentially so. The example is surely homely and familiar enough;[56] no one would urge that the procedure followed is beyond the power of a federal court, or even improper, under article III.

Cases and controversies also frequently involve two or more issues of law or mixed law and fact that are potentially dispositive, even though, in the end, only one may dispose of the case. When this is true, it is a proper exercise of judicial power to determine both issues. In the end, perhaps both adjudications will support the judgment rendered, and hence be dispositive; or possibly one issue will be adjudicated adversely to the winning litigant, but judgment will be rendered in his favor on the basis of a favorable adjudication of the other. Both results are commonplace, and neither is subject to query under article III.

A defendant sued for patent infringement will prevail, for example, if the court concludes either that the patent is invalid or that the defendant is not infringing. But neither issue is rendered moot or nonjusticiable by the presence of the other. If both are resolved in favor of the defendant, both are concluded under the doctrine of collateral estoppel,[57] and the court's holding as to each is stare decisis, under the

54. *E.g.*, Fed. R. Civ. P. 12(b)(6).

55. Failure to state a claim upon which relief can be granted is not waived, for example, by failure to assert it in a motion or the initial responsive pleading; it "may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits." Fed. R. Civ. P. 12(h)(1).

56. Thus a complaint should not be dismissed for legal insufficiency on a motion under rule 12(b)(6), and the legal issue postponed, "*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" 2 Moore, Federal Practice ¶ 12.08, at 2245 (2d ed. 1962).

57. Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926); First Nat'l Bank v. City of Covington, 129 Fed. 792 (C.C.E.D. Ky. 1903), *aff'd*, 198 U.S. 100 (1905); Patter-

generally prevailing view.[58] If the plaintiff prevails on one of these issues, but judgment goes for the defendant on the other, it is true that the judicial determination adverse to the winning defendant is normally not entitled to collateral estoppel effect, both because it is not a dispositive adjudication and because the defendant generally has no right of appeal; nor is the court's holding on the nondispositive issue part of the ratio decidendi of the case.[59] But the issue cannot be identified as nondispositive until the case is heard, and the court therefore properly determines the issue. A problem of mootness and nonjusticiability does not arise *during* the litigation. Thus if the court concludes that the patent is valid but not infringed, the decision is not authority for the proposition that the patent is valid, either as collateral estoppel or as stare decisis. But the court did not err in considering and adjudicating the issue, and its disposition of the issue obviously has some predictive value.[60]

Only if the issue of validity becomes moot during litigation would its adjudication be improper. In *Cover v. Schwartz*,[61] such a situation faced the Second Circuit. The plaintiff appealed from a judgment for defendant based on a finding that a patent was invalid; in his brief on

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son v. Saunders, 194 Va. 607, 74 S.E.2d 204 (1953), 28 NOTRE DAME LAW. 282, 39 VA. L. REV. 566; Green v. Edwards, 31 R.I. 1, 77 Atl. 188 (1910); Hardware Mut. Ins. Co. v. Valentine, 119 Cal. App. 2d 125, 259 P.2d 70 (4th Dist. 1953); RESTATEMENT, JUDGMENTS § 68, comment *n* (1942).

58. See Massachusetts v. United States, 333 U.S. 611, 623 (1948).

59. *E.g.*, Cantoria v. Jeffery, 307 Mass. 49, 29 N.E.2d 555 (1940); Schofield v. Rideout, 233 Wis. 550, 290 N.W. 195 (1940); RESTATEMENT, JUDGMENTS § 68, comment *o* (1942).

Even here, there is some authority for a contrary position. Florida Cent. R.R. v. Schutte, 103 U.S. 118 (1880) (stare decisis; *arguendo* as to collateral estoppel); Cold Metal Process Co. v. E. W. Bliss Co., 285 F.2d 231 (6th Cir. 1960); Clark v. Knox, 32 Colo. 342, 76 Pac. 372 (1904).

60. In the patent situation under discussion, the Supreme Court has held that the predictive value of the nondispositive adjudication of the patent's validity is such that, even though the adjudication is not conclusive under the doctrine of collateral estoppel, and even though the defendant, having won in the district court by virtue of the adjudication of noninfringement, has no standing to appeal the adjudication of validity on its merits, nonetheless the court of appeals is under obligation to entertain an appeal for the sole purpose of expunging from the decree the adjudication of validity. Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939), explained on this basis by Chief Judge Learned Hand in Harries v. Air King Prods. Co., 183 F.2d 158, 161 (2d Cir. 1950). The *Electrical Fittings* case recognizes the propriety of the initial adjudication of validity, and holds merely that in this limited situation the result must be expunged from the decree since no appellate review on the merits is available to the party unfavorably affected by the adjudication.

61. 133 F.2d 541 (2d Cir. 1942), *cert. denied*, 319 U.S. 748 (1943).

appeal, the plaintiff conceded the correctness of the trial court's additional finding that defendant was not infringing. Here, during pendency of the appeal, it became obvious that the issue of validity not only would not, but could not, be dispositive, and Judge Frank properly concluded that the case had become moot. Absent the concession of one issue, however, both would have remained live, and the court might properly have considered both.

The situation is the same when the two issues are, first, whether a precedent ought to be overruled and, second, whether the overruling decision ought to be limited to prospective effect. A defendant relying on the precedent may prevail if the court either decides to retain the precedent or, having rejected it, decides to limit the new rule to prospective effect. Both issues are justiciable, even though the decision of one of them may, in the end, not be dispositive in the collateral estoppel or stare decisis sense.

### *B. The Separation-of-Powers Argument*

Even though prospective limitation fits neatly enough into the traditional framework of article III judicial power—in that it merely adds a potentially nondispositive issue, perhaps one of several such, to a justiciable case or controversy—the separation-of-powers argument remains. It is basically that prospective limitation is a technique suited primarily to law-making, or law-changing, and that its use by courts invites, or perhaps even constitutes, invasion by the judiciary of areas relegated to other institutions of government—in the case of the federal government, to Congress and to the constitutional amendment processes.

Since the Supreme Court has never expressly considered whether it is proper for federal courts to use the prospective limitation technique, it has never directly considered the separation-of-powers argument. Mr. Justice Black, however, urged the argument in a dissenting opinion in *James v. United States:*

> In our judgment one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application. This Court and in fact all departments of the Government have always heretofore realized that prospective lawmaking is the function of Congress rather than of the courts. We continue to think that this function should be exercised only by Congress under our constitutional system.[62]

62. 366 U.S. 213, 225 (1961). Other aspects of *James* are considered in the text accompanying notes 103-07, 170-74 *infra*.

Chief Justice von Moschzisker in 1924 had urged similarly, but more broadly, that prospective limitation of overruling decisions was "plain and outright legislation by the courts,"[63] and arguments have since been made that the pliability of the prospective limitation approach might promote judicial legislation to an undesirable extent,[64] and that normally legislation is a more suitable tool for bringing about desired changes in the law.[65]

Mr. Justice Black's language brings these objections to bear upon the federal courts, and in particular, of course, the Supreme Court of the United States.

The bearing of the doctrine of separation of powers on the availability of prospective limitation as a technique for exercising the federal judicial power appears to raise problems of constitutional proportions, even though the technique does not violate the justiciability requirement imposed by article III. Although measured to some extent by article III, the separation doctrine is more broadly based, and is rooted in various other provisions of the Constitution, as well as in the organizational structure of the first three articles.[66]

In the absence of any obviously relevant specific constitutional language or precedent, it might be reasonable to hope that the constitutional aspect of the separation-of-powers problem could be resolved by an appeal to history. Both Mr. Justice Frankfurter and the first Mr. Justice Harlan suggested that the key to the question of justiciability under the "case or controversy" language of article III was to be found in the *modus operandi* of the courts of Westminster at the time the article was drafted and adopted.[67] Given the apparent hegemony of

63. Von Moschzisker, *supra* note 44, at 426.

64. Note, 47 HARV. L. REV. 1403, 1412 (1934).

65. See Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962) (dictum); PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 579 (1953).

66. Opinion of Mr. Justice Jackson in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590-91 (1949), quoting Chief Justice Hughes in Principality of Monaco v. Mississippi, 292 U.S. 313, 323 (1934): "The doctrine of separation of powers is fundamental in our system. It arises, however, not from article 3 nor any other single provision of the Constitution, but because 'behind the words of the constitutional provisions are postulates which limit and control.'"

67. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring); see Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517 (1898) (Harlan, J.). Mr. Justice Harlan actually was speaking of the scope of the jurisdiction of the colonial courts following the American Revolution, but his position appears to have been that article III could not exceed this historically defined

the Blackstonian declaratory-retroactive view of judge-made law at that time,[68] it would appear that the phrase "judicial power" in article III could not have been understood by eighteenth century lawyers to give to the federal judiciary any law-making power in the sense generally recognized today; and hence one might conclude that the separation of powers contemplated by those who drafted, and those who accepted, the Constitution would be violated by adoption of a broader judicial technique that frankly recognizes, and is designed specifically to facilitate, the judicial law-making function. But one might more accurately surmise that since the drafters had not even imagined prospective limitation, they did not contemplate its possible impact upon the separation of powers, and that the creation of the federal judicial power thus does not imply any judgment at all on the question.[69] If this view is taken, the propriety of prospective limitation with reference to the separation of powers remains open for consideration on its merits. But even if the former view is taken, the historical approach does not compel rejection of the prospective limitation technique by federal courts.

The historical argument, in its more ambitious form, attaches to the "judicial power" language of the Constitution and thus would appear to be equally applicable, if valid, to any case that might come before a federal court, at least on a question of federal law.[70] Thus if the ques-

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scope. See FORRESTER & CURRIER, CASES ON FEDERAL JURISDICTION AND PROCEDURE 68 (1962). On the vulnerability of this approach, see note 69 *infra*.

68. See text accompanying notes 8, 9, 12-16 *supra*.

69. Professor Wolfgang Friedmann observed: "Serious lawyers as well as laymen have again advanced the proposition that the Court must stick to the interpretation of the Constitution as it can be deduced from the actual or presumed intention of the Founding Fathers," citing, "among many others, a statement by Chief Judge Felton of the Court of Appeals of Georgia—issued by the Georgia Commission on Education: 'When Is a Supreme Court Decision the Law of the Land?'" FRIEDMANN, LAW IN A CHANGING SOCIETY 43 (1959). Professor Friedmann regarded this as a "patently absurd proposition," and quoted the following passage of Learned Hand:

> "Not only is it true that, 'if by the statement that what the Constitution meant at the time of its adoption is what it means to-day it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation'; but it is also impossible to fabricate how the 'Framers' would have answered the problems that arise in a modern society had they been reared in the civilization that has produced those problems. We should indeed have to be sorcerers to conjure up how they would have responded."

HAND, THE BILL OF RIGHTS 34-35 (1958), cited in FRIEDMANN, *op. cit. supra* at 43.

70. As to departures from precedent in applying state law, the retroactivity question would appear to be controlled by the doctrine of the *Erie-York-Byrd* line of deci-

tion is one of federal common law, not requiring interpretation of a federal statute or of the Constitution, the original understanding of "judicial power" indicates that federal common law does not change, but rather that the Supreme Court's appreciation of it becomes more

sions. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525 (1958). If a federal court may never overrule an obsolete state precedent, as Judge Jones of the Fifth Circuit asserted in Polk County v. Lincoln Nat'l Life Ins. Co., 262 F.2d 486, 490 (5th Cir. 1959), the availability of the prospective overruling technique in federal courts need never arise in this context. But diversity jurisdiction might lead a federal court to decide a case of first impression that the state courts have not had presented to them, as in Daily v. Parker, 152 F.2d 174 (7th Cir. 1945). Further, it appears that Judge Jones' position has been rejected by the Supreme Court. In Nolan v. Transocean Air Lines, 365 U.S. 293 (1961), the Court set aside a Second Circuit decision for mechanically following an unbroken line of state intermediate appellate court decisions rather than dictum from a later state supreme court decision. The Court directed the federal appellate court to consider the dictum and to give it and the older holdings the same relative weight as would be afforded them by the highest court of the forum state. On remand, the court of appeals first commented, "we just don't know," before reaching what it referred to as a "two-dimensional surmise," 290 F.2d 904, 905-06 (2d Cir. 1961), and again favored the old holdings over the more recent dictum. The Supreme Court denied certiorari, 368 U.S. 901 (1961). Taking similar positions are Mason v. American Emery Wheel Works, 241 F.2d 906, 909 (1st Cir.), *cert. denied*, 355 U.S. 815 (1957) ("Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is."), and Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945) ("What would be the decision of reasonable intelligent lawyers, sitting as judges of the highest New York court, and fully conversant with New York jurisprudence?"). See also Note, 59 COLUM. L. REV. 504 (1959).

In any event, the Court's position in the *Nolan* case indicates that, should a federal court feel compelled to depart from antiquated state precedent, it should be bound in doing so by the choice that the state court of last resort would make between prospective limitation and retroactive application. And certainly if the state supreme court has overruled a case with prospective effect only, federal courts ought to give the new decision prospective effect only. It is established, of course, that if the state court's overruling decision is, as it has been in most cases, with retroactive effect, federal courts must apply it retroactively, even at the appellate stage in pending litigation. Huddleston v. Dwyer, 322 U.S. 232 (1944); Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941).

There may be a difference, however, between following state law as to the question whether a state overruling decision is to be given retroactive effect in a federal court and adopting a state's practice of prospective overruling when the federal court is called upon to depart from a state precedent. The latter problem, it seems to me, potentially involves (as does the problem of jury trial) "an essential characteristic" of the federal "independent system for administering justice to litigants who properly invoke its jurisdiction." Byrd v. Blue Ridge Rural Elec. Co-op., Inc., *supra* at 537. Thus if prospective overruling is beyond the pale of article III, the prevailing state practice surely cannot legitimate it. But the problem is moot if I am correct and the practice is proper in federal courts. In this event, it would appear that federal courts may and should follow state practice in deciding whether to overrule with prospective effect only or with retroactive effect as well.

acute. Changing the law is a function intended to be left to the legislative branch. Similarly, judicial reinterpretation of statutory language is proper only if understood as an altered judgment as to the original meaning of the statute, and violates the historically contemplated separation of powers if engaged in for the purpose of change, which is a power given only to the legislative branch. If the question is one of constitutional interpretation, "judicial power" cannot be regarded as having any additional meaning; reinterpretation is a judicial function only when its purpose is better to ascertain original meaning. Change here is left not to Congress, but to the constitutional amending processes. In short, if the original understanding of "judicial power" were accepted as the sole determinant, it would appear to draw the same line in all of these areas: the federal courts invade fields left by the Constitution to other institutions of government if they reverse precedent for any reason other than recognition of a result that has always been correct; facilitation of judicial law-making as such is encouragement to the federal judiciary to make such invasions.

Adherence to this historical evaluation of "judicial power" would certainly be embarrassing in a number of areas. The constitutional basis for the *Erie* decision,[71] for instance, would be destroyed, or at least rendered precarious,[72] and a lot else besides. But there is no need

71. Erie R.R. v. Tompkins, *supra* note 70.

72. See Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U.L. Rev. 427, 437-48 (1958); Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013, 1024-35 (1953), to the effect that the practice under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), became unconstitutional by the time of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), essentially because of "a changed jurisprudence rather than a changed view of the Constitution." 53 Nw. U.L. Rev. at 443.

While I am inclined to agree with Professor Hill, a constitutional basis for *Erie* can be derived even in Blackstonian theory. This is an idea for which I am indebted to a conversation with Professor Roy A. Schotland. Injection of the problem of a dual court system—with which declaratory theory had never had to reckon—could have resulted in the institution of a federal judicial power by the framers less extensive with regard to state common law than classic declaratory theory would otherwise have ordained. The seeds of this idea are present in Professor Hill's discussion of sovereign "legislative jurisdiction" as a factor that should limit a court's law-making power. 53 Nw. U.L. Rev. at 445-47. While I would hesitate to project consciousness of this possibility backwards to the framers of article III, this need not be determinative. See note 69 *supra*. And in any event, there are indicia in Mr. Justice Story's opinion in *Swift v. Tyson* that he was possibly making a choice dictated by policy rather than by unthinking adherence to declaratory theory; notably his willingness to except from federal judicial independence the areas of statutory interpretation, and "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character." 41 U.S. (16 Pet.) at 18.

to dwell on the consequences of making the Blackstonian declaratory theory constitutional dogma, because no one would seriously suggest that this be done. It having long since been generally accepted that the Constitution is a living document, one must be cautious in pushing historical interpretations of its meaning.[73]

Moreover, it should be borne in mind that the facilitation and encouragement of judicial law-making is by no means the sole purpose of the prospective limitation technique. An overruling decision may well have no "legislative" content. That is, it may not be concerned with "change" at all; it may simply be intended to state more accurately what has always been the law. Such a decision would fit precisely into the Blackstonian format, but the prospective limitation technique is still relevant. Interests may have been created in reliance on the old precedent that are deserving of protection; and society may have a predominant interest in stability in the affected area, if a rule of property, or similar institutional rule demanding stability, is involved.[74] These interests are as much entitled to protection when the prior decision is later recognized as having been "wrong" when rendered as they are when the court consciously undertakes to change a formerly "right" rule. The prospective limitation technique facilitates unquestionably proper Blackstonian overruling as well as objectionable judicial legislation and, when properly utilized, is a valuable instrument for preventing gross miscarriages of justice resulting from departure from precedent in either case.[75] It is, in short, an appropriate technique for the exercise of federal "judicial power," even as originally understood.

Mr. Justice Black's argument is not limited to this vulnerably ambitious historical approach to article III, however. Even if the prospective limitation technique does not exceed the historically derived scope of article III judicial power, it may in some way violate the underlying postulates of separation of powers, and these may best be functionally, rather than historically, understood. And the argument makes its appeal to wisdom and policy, in any event. Even if constitutional boundaries of separation of powers are not crossed by prospective overruling, the Constitution need not be read as recommending that, in the conduct of government, each branch exercise all power given, if to do so would create unnecessary friction or otherwise disturb the har-

73. See note 69 *supra*.

74. See Part III *infra*.

75. Thus even at the zenith of declaratory theory, retroactive application was denied in some extreme cases. See notes 19-21 *supra*.

monious operation of a government of delegated and separated powers.[76] Even if the judicial branch may, under the Constitution, avail itself of the prospective limitation technique, there may thus be serious reasons why it should choose not to do so. Mr. Justice Black's argument ought to be reconsidered with these possible meanings in mind.

Whether constitutional in the strict sense or discretionary, the argument runs along similar lines. Forcing courts to overrule retroactively or not at all tends to minimize objectionable judicial legislation—that is, judicial legislation that is in some way disruptive of the harmonious functioning of a multipartite government—by rendering it difficult for a court to overrule a prior decision because of the injury that will result from retroactive application of the newly announced rule to interests that have been created in reliance upon the old rule. This argument, it should be noted, applies to any exception to retroactive application of an overruling decision, whether made by the overruling court or by another in a later case. The hobble, though self-imposed in any area where the Court might choose or feel constitutionally compelled to adopt it, is itself nonselective. It would operate equally to discourage all departure from precedent, whether departure in any particular case might be eminently desirable, and inoffensive to other branches of government, or the most objectionable kind of judicial law-making. In cases where the pressure to overrule is so strong as to brook no opposition, the hobble results in potential individual injustice of the grossest sort. Whatever the contribution to smooth and harmonious functioning of government, the device is unnecessarily clumsy and exacts too high a price in unfairness to private persons. Surely there is something unattractive about a course of "self-restraint" which works thus indirectly, which gives the courts pause before they act in a certain way because whenever they do so it is so very hard on innocent bystanders. This mode of judicial self-restraint seems a particularly blunt instrument when it is borne in mind that there is no correlation between situations where there will be a tendency to "legislate" and the existence of "hostages," of persons who have acted in reliance on the old law. People are not much less likely to rely on bad law which should be overruled. Presumably there is as much bad prop-

76. The abstention cases are in point, *e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), as is the judicially created doctrine requiring exhaustion of administrative remedies, observed as early as Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) (Holmes, J.).

erty law—on which men are obliged to rely regardless[77]—as there is procedural law—on which there is apt to be less reliance.

If it is necessary for the federal courts to use this mechanical restraint at all—and it is unsettling to think that they should have to—it seems clear that it should apply only in cases where there is a risk of disruption of intragovernmental harmony. *James v. United States*,[78] the case in which Justice Black advanced the argument, involved reinterpretation of a federal statute after the Court's prior interpretation had survived a major revision of the statute without legislative rejection. It was against this background that he spoke. And his argument might be limited to overruling decisions that reinterpret federal statutes, or that do so after legislative consideration of the precedent under attack. It is here that harmony between Court and Congress is most directly at stake. And even here, the weight of the argument varies depending upon the statutory milieu to which it is applied.

In *James*, for example, the reversal was upon a narrow and isolated point, and the statute involved represented a mighty legislative effort—the Internal Revenue Code—and Congress had in the interim expended considerable energy and attention in revising it.[79] Judicial self-restraint might well have been desirable. But it does not follow from this that the Court ought to accord the same weight to legislative inaction with regard to all statutory interpretation.

Consider two situations that might arise in connection with section 301 of the Labor Management Relations Act.[80] The initial determination that that piece of legislation was intended to authorize the creation of a body of federal common law to govern the enforcement of collective bargaining agreements was of tremendous importance and was doubtless studied and evaluated by everyone, in Congress and out, interested in labor law and the broader issues involved.[81] And yet Con-

77. See, *e.g.*, the discussion of Donohue v. Russell, 264 Mich. 217, 249 N.W. 830 (1933), in Kocourek & Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971-72 (1935).

78. 366 U.S. 213 (1961). For further discussion of *James*, see notes 103-07, 170-74 *infra* and accompanying text.

79. INT. REV. CODE OF 1954. This act completely recodified federal revenue taxation laws. See 68A Stat. 1-934 (1954).

80. 29 U.S.C. § 185 (1958).

81. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). The case received wide attention. See Bickel & Wellington, *Legislative Purpose and the Judicial Process. The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Bunn, *Lincoln Mills and the Jurisdiction To Enforce Collective Bargaining Agreements*, 43 VA. L. REV. 1247 (1957); Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43

gress has not legislatively overruled or amended the action of the Court in subsequent sessions, despite the fact that there has been a major legislative effort in the labor field[82] since the *Lincoln Mills* decision.[83] It is not unreasonable in these circumstances to assume that congressional acquiescence by inaction is meaningful, that it is conscious and deliberate, and that the courts should be mindful of it. Other considerations apart, it might well be appropriate for the Supreme Court to suppress a later inclination to overrule *Lincoln Mills* in the face of such acquiescence. Suppose, on the other hand, that the Supreme Court had become dissatisfied with some narrow rule it had formulated under the broadly interpreted section 301. Again, suppose that Congress has acquiesced by failing to pass on the point in subsequent labor legislation. This acquiescence would certainly be less significant than that in the *Lincoln Mills* situation, because the attention of the legislators was less likely to have been focused on the rule in the first place. Moreover, in developing principles to govern collective bargaining agreements covered by the act, the Court requires considerable leeway to correct its own mistakes;[84] and, at least until Congress directs further attention to section 301, it seems unlikely that the Court would tread upon congressional toes by doing its best with the statutory material at hand. Thus an undiscriminating device to impose self-restraint in all areas where Congress has acted and then failed to *react* to a court interpre-

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VA. L. REV. 1261 (1957); Kramer, *In the Wake of Lincoln Mills*, 9 LAB. L.J. 835 (1958); Pirsig, *The Minnesota Uniform Arbitration Act and the Lincoln Mills Case*, 42 MINN. L. REV. 333 (1958); *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 83, 173 (1957); Note, 57 COLUM. L. REV. 1123 (1957); Note, 42 MINN. L. REV. 1139 (1958); Comment, 30 ROCKY MT. L. REV. 62 (1957); Comment, 32 TUL. L. REV. 447 (1958); Comment, 25 U. CHI. L. REV. 496 (1958); Comment, 35 U. DET. L.J. 376 (1958); 43 CORNELL L.Q. 503 (1958); 36 N.C.L. REV. 215 (1958); 12 SW. L.J. 123 (1958); 9 SYRACUSE L. REV. 110 (1957); 1957 U. ILL. L.F. 528; 11 VAND. L. REV. 243 (1957); 3 VILL. L. REV. 109 (1957).

82. Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-530 (Supp. V, 1964). Although the case invoked widespread interest and attention, see the section entitled *Labor Relations Cases* in Conference of Chief Justices, *Report of the Committee on Federal-State Relations As Affected by Judicial Decision* (Aug., 1958), in PRITCHETT, CONGRESS VERSUS THE SUPREME COURT: 1957-1960 app. 2 (1961) and materials cited in note 81 *supra*, no mention of the decision was made in the congressional reports on the bill, see 1959 U.S. CODE CONG & AD. NEWS 2813, and a more-than-cursory perusal of the records of the debates on the bill turns up no evidence of concern either. See 105 CONG. REC. 5974, 5983, 6103, 6109, 6131, 6210, 6228, 6230, 6237, 6280, 6284, 6296, 6389, 6393, 6409, 6425, 6434, 6436, 6461, 6515, 6638, 6715, 15516, 15660, 15882, 17839, 17898 (1959).

83. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

84. For example, a decision as to what constitutes acceptance of an offer in one industrial context might prove to be ill-suited to others or generally unworkable.

tation appears inappropriate to the purpose of minimizing objectionable, as distinguished from desirable, judicial law-making in the federal system. As I have suggested, I think this purpose would be best served, and at the least cost to other interests, by *ad hoc* consideration, when precedent is questioned, of the impact that overruling would have upon the other components of government.[85]

If this is true where Congress has acted, it would appear to be even more clearly so where Congress has not. In the area of federal common law, analysis of the kind performed by Mr. Justice Rutledge in *United States v. Standard Oil Co.*[86] seems sufficient to differentiate between situations in which the Court should and should not defer to legislative action. Recognizing the Court's creative power in the federal common-law area, Mr. Justice Rutledge refused to create a new tort liability to the United States for expenses caused by injury to a federal employee, despite analogous doctrinal developments in general tort law:

> Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. . . .
>
> Moreover Congress without doubt has been conscious throughout most of its history that the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with federal funds, property and relationships. We cannot assume that it has been ignorant that losses long have arisen from injuries inflicted on soldiers such as occurred here. . . .
>
> When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end. We think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes.
>
> In view of these considerations, exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise in view of the settled contrary practice, which

85. Every overruling decision requires *ad hoc* determination anyway, so that no great additional burden to judicial efficiency would be required by this suggestion.

86. 332 U.S. 301 (1947).

> action by Congress would avoid, not only here but in the many other cases we are told may be governed by the decision.[87]

The concluding sentence suggests that Justice Rutledge assumed the new rule would be retroactive if adopted, but the important point here is that he decided to adhere to precedent primarily because of an individualized judgment on the appropriate branch of government to create the new rule in question. Self-restraint of the sort exercised in the *Standard Oil* case seems entirely adequate in this and other areas for the preservation of intragovernmental harmony. It should be stressed that it is not the fact that a particular change in decisional law is given prospective effect that makes the action disruptive of harmony. It is the change itself. Prospectivity is potentially disruptive only in that it may induce a greater willingness to act at all, to overrule. That decision having been made, it is no boon to other branches of government that the change be made retroactive. Indeed, a retroactive change is often apt to be more offensive to other branches than a prospective change. If self-restraint in the interest of harmony is appropriate, it should be exercised at the point when it is meaningful, as it was in *Standard Oil;* that is, at the point when the court decides whether or not to change the existing rule. The simple point: prospective limitation is not itself an offense against intragovernmental harmony.

In the area of constitutional interpretation, the argument against the prospective limitation technique on the basis of intragovernmental harmony seems to have a very different kind of weight. The constitutionally sanctioned amendment processes, rather than Congress, are the governmental institution whose proper field of action ought not to be invaded by the Court. These processes are made up of an amalgam of Congress, state legislatures or conventions, and possibly a national convention.[88] This institution of government, in any event, cannot strike back as readily as Congress can. Long-term and serious appropriations of the amendment power by the Court are perhaps rendered more dangerous, in the long run, by this factor.[89] In any event, change,

87. *Id.* at 314-16.

88. U.S. Const. art. V.

89. Possibly, as Learned Hand suggested, a nation that needs saving from itself by judges is beyond this kind of salvation. Hand, The Bill of Rights 73 (1958). If this is true, it would be far better for national intransigence to judicial salvation to make itself felt through established, well-oiled legislative machinery. Regular, frequent institutional adjustments seem preferable to the kind of institutional alteration likely to come when pressures have built up sufficiently to set the amendment processes in motion.

whether regarded as correction of old mistakes, adapting old concepts to changed social conditions, or simply judicial law-making, has occurred and will continue to occur in the interpretations placed by the Court on constitutional language.[90] Again, it appears that across-the-board rejection of the prospective limitation technique is not an appropriate device for discriminating between legitimate and illegitimate exercise of the Court's judicial power. Just as in the cases of statutory interpretation and federal common law, there are precedents which need overruling, as well as those which ought to command adherence, and *ad hoc* discrimination between them seems preferable to imposition of a rule that does not perform this purpose. And when it is determined that precedent should and may safely be rejected, the fact of change, rather than its genesis, creates the need for prospective limitation of the new rule in appropriate situations.

Consider, for example, the potential impact of retroactive application of *Brown v. Board of Education*.[91] While it has not been discussed in those terms, it seems clear that the rule derived in *Brown* was limited to prospective effect, else how explain the Court's order the following fall that the rule be complied with only with "deliberate speed?"[92] Given the normal retroactive application, ought not all state officials responsible for registration of pupils in public schools to have complied immediately? Indeed, might not a state official who had, in reliance upon *Plessy v. Ferguson*,[93] denied a Negro child admission to an all-white school on the basis of race be rendered civilly liable for this intentional deprivation of a constitutional right? Yet this appears to be a clear case for protection of those who act in reliance upon contemporaneous law.[94] In the case of *Brown*, analysis of the problem of retroactive application was apparently forestalled by the announcement, in the Court's original opinion, that the newly recognized principle would require conscious, planned implementation,[95] but the result seems sound on the basis of the values discussed in the

90. See, *e.g.*, Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 CORNELL L.Q. 55 (1948); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736-58 (1949); *Precedent and the Constitution*, 3 RACE REL. L. REP. 395 (1958). For an earlier catalog see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932). For a more recent one see 1B MOORE, FEDERAL PRACTICE ¶ 0.402 [3.-1] (2d ed. 1965).

91. 347 U.S. 483 (1954).

92. 349 U.S. 294, 301 (1955).

93. 163 U.S. 537 (1896).

94. See Part III *infra*, for a discussion of reliance as a criterion for prospective limitation.

95. See Brown v. Board of Educ., 347 U.S. 483, 495-96 (1954).

following section.[96] It is, of course, true that the Court took a monumental step in the *Brown* decision, one which many would have preferred to leave to Congress or the processes of constitutional amendment. Nor can it be denied that, if the Court had felt compelled to give *Brown* retroactive effect or, at least, instant implementation, it might not have acted at all. For those who agree that this radical change might better have been left to Congress, the case superficially appears to give weight to the argument of those who would make all decisions retroactive as a brake on judicial legislation. But suppose one agrees that the *Brown* decision was an appropriate exercise of judicial power. Had the retroactive hobble been applied, the Court would either have had to take and decide the case as it did—at a great and passion-provoking cost to officials who had relied on *Plessy*—or decline to take the case, thus allowing a vast denial of critical constitutional rights to continue unchecked at whatever cost to the image of justice. It is not lightly to be assumed that the Supreme Court cannot properly gauge its constitutional scope or that it did not do so in the *Brown* case. If the Court was right to act in *Brown*—as one may well conclude—how unreasonable to force it to act retroactively and to work tremendous hardships unfairly. How much better to forego the mechanical restraint, and to rely on the Court's expert and sensitive feel for the proper limits of its sphere of action and the needs of a government of separated powers.

Against the need for the prospective limitation technique in federal constitutional interpretation, there stands for consideration the idea that the Court should concern itself with the appearance of what it does, as well as the fact. Should the Supreme Court be influenced, in deciding whether or not to utilize the technique of prospective limitation, by concern for the image that will thereby be projected to Congress, to the constituents of the constitutional amending processes, or the public at large? Mr. Justice Frankfurter's assertion[97] may be converted into a question: Should candor compel public acknowledgement by the Court that what it is doing in a given case is making law? Or would the Court be better advised to attempt to serve up new rules in old packages, to make law in the guise of finding it, rather than admit to a practice which may be unpalatable to other institutions of government or to the public?

The prospective limitation technique does reveal to public scrutiny

96. See Part III *infra*.

97. Griffin v. Illinois, 351 U.S. 12, 25 (1956).

that a new rule is pragmatically a new rule. But this is fairly obvious anyway. If interests established in reliance upon rejected precedent are not protected, it seems likely that the newness of the new rule will be even more keenly realized. If civil liability for tortious deprivation of civil rights had been imposed retroactively upon state officials who had barred admittance of Negroes to public schools prior to *Brown*, for instance, the Blackstonian symmetry of retroactive application would not have stilled the protests that the Court had amended the Constitution. The symmetry would have been more than offset by outrage at the failure to protect public officials who discharged their duties in accordance with the law as then announced. In short, it does not seem that adherence to the principle of retroactive application would serve any useful purpose in rendering judicial changes of law more acceptable, or less unacceptable. And even if it did, I would find myself hesitant in the extreme to suggest the propriety of elevating palliation of potential criticism to a principle of judicial conduct.

The Supreme Court has yet to rule squarely on the question whether federal courts should utilize the prospective-effect approach to overruling decisions in appropriate circumstances, though the issue has come up in several cases. Mr. Justice Black himself, in a dissent in *Mosser v. Darrow*,[98] urged the Court to use the technique, and in *England v. Louisiana State Board of Medical Examiners*,[99] the Court did in fact limit a decision to prospective effect.

Mr. Justice Frankfurter suggested similar treatment of the decision in *Griffin v. Illinois*.[100] As in *Mosser* and *England*, the Court was not faced squarely with the problem of overruling a prior decision, but rather with a case of first impression. Mr. Justice Frankfurter suggested, however, that "candor compels acknowledgement that the decision . . . [was] a new ruling."[101] Urging prospective limitation, he said:

> We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law.[102]

98. 341 U.S. 267, 275 (1951), discussed in text accompanying notes 155-58 *infra*.

99. 375 U.S. 411 (1964), discussed in text accompanying notes 159-61 *infra*.

100. 351 U.S. 12, 25-26 (1956) (concurring opinion).

101. *Id.* at 25.

102. *Id.* at 26.

In *James v. United States*,[103] the Court in effect limited an overruling decision to prospective effect, though it must be conceded that it did so in a curious way and with notable lack of unanimity. The case is discussed in some detail in the final section.[104] To give a brief resumé, six Justices favored overruling the old case under attack; three would have let it stand. Three of the six Justices favoring overruling wanted to limit the new precedent to prospective effect for reasons discussed below,[105] and, with the votes of the three Justices who did not want to overrule at all, were able to achieve this result. Thus, the old case was overruled as a precedent, but the new rule was not applied in the instant case. In effect this was a typical prospective overruling, but only three Justices expressly favored an approach similar to that technique.[106] Justices Black and Douglas, whose votes against overruling were needed to accomplish the prospective limitation, expressly objected to the "prospective way in which this [overruling] is done."[107]

The net effect of these decisions is that the Supreme Court has appeared to use the prospective technique in some cases, has declined to do so in others, but has yet fully to articulate a position on the issue. For the reasons discussed in this section it is to be hoped that the Court will decline to take the position that federal courts cannot act prospectively; it would certainly be hard to square some past decisions with that view. Further, it is to be hoped that in an appropriate case the Court will expressly approve the use of the practice so that the federal courts will feel free to use a technique that can significantly improve the quality of justice dispensed by those courts in the relatively few cases which call for overruling or a major change in the law.

## III. Criteria for Limiting Decisions to Prospective Effect

When overruling decisions have been denied retroactive effect, it has almost always been for either or both of the following reasons: (1) to protect persons who have ordered their affairs in reliance upon what they contemporaneously perceived to be the law;[108] (2) to

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103. 366 U.S. 213 (1961).

104. See text accompanying notes 170-74 *infra*.

105. *Ibid.*

106. Mr. Chief Justice Warren and Justices Brennan and Stewart. James v. United States, 366 U.S. 213, 221 (1961) (opinion of Warren, C.J.).

107. 366 U.S. at 223 (Black, J., dissenting).

108. See, *e.g.*, cases cited in notes 125-27, 132, 133 *infra*. "The bond common to almost all cases refusing to apply a decision retroactively is the element of justifiable reliance. The primary purpose of limiting a decision to prospective application is to

protect stability in an area where society has recognized stability to be of particular importance.[109] Of these two reasons, the first is a recognition of the value of certainty in law; it protects the individual's right to rely on existing law in managing his affairs. The second is a recognition of the value of stability in the operation of certain social institutions. These are but two of the social values that are normally protected by the doctrine of stare decisis when precedent is adhered to. The problem for analysis here, however, is the scope that ought to be given to a departure from precedent; a proper perspective requires that attention be given not solely to these two values, but to the other values normally protected by adherence to precedent as well, and to the impact upon all of these values first, of any departure from precedent, and second, of a departure from precedent that is limited to prospective effect. Finally, in order to be reasonably complete, it may be necessary for the analysis to take account of the value that induces the overruling court to depart from precedent in the first place.

In attempting to identify "values" that merit consideration when a court must decide whether to depart from precedent, I do not mean to imply any judgment as to the immutability, absoluteness, or self-evidence of the values identified, nor as to the tenability of any particular ethical or philosophical process of derivation or justification by which they might be supported. All I assert here is that these are values that do in fact support our general adherence to the doctrine of stare decisis; and that therefore when questions are raised as to departures from that doctrine, and the scope of such departures, these values should be taken into account.

The general practice of adherence to precedent is of course grounded to a considerable extent in factors of habit, tradition, historical accident, and sheer intellectual inertia.[110] But in addition to such social and psychological roots, it also seems to rest on the following values.

(1) *Stability*. It is clearly socially desirable that social relations should have a reasonable degree of continuity and cohesion, held

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prevent the impairment of rights acquired in reliance on a prior decision." Note, 46 IOWA L. REV. 600, 601 (1961). "The only blanket test which might be at all workable would be to make prospective operation depend upon 'reliance'." Note, 60 HARV. L. REV. 437, 440 (1947). Compare Note, 47 HARV. L. REV. 1403, 1404 (1934), describing the jurisprudence as verbally adopting the formula that "overruling decisions operate retroactively unless they would disturb vested contract or property rights acquired in reliance on decisions involving the construction or validity of statutes."

109. See, *e.g.*, cases cited in notes 125-27, 132, 133 *infra*.

110. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 21-22 (1921).

together by a framework of reasonably stable institutional arrangements. Continuity and cohesion in the judicial application of rules is important to the stability of these institutional arrangements, and society places great value on the stability of some of them. Social institutions in which stability is recognized as particularly important include the operation of government, the family, ownership of land, commercial arrangements, and judicially created relations (as manifested in the doctrine of res judicata).[111]

(2) *Protection of Reliance.* As previously mentioned, the value here is the protection of persons who have ordered their affairs in reliance upon contemporaneously announced law. It is obviously desirable that official declarations of the principles and attitudes upon which official administration of the law will be based should be capable of being taken as determinate and reliable indications of the course that such administration will in fact take in the future. Private citizens, lawyers, public officials, and judges themselves should not be left in doubt about what "the law" requires, but rather, should be able generally to take past declarations as authoritative assurances upon which prediction of future decisions, and arrangement of present affairs, can reasonably be based.[112] This value might be regarded as a personalized variation on the value of stability; but it is broader in that it is recognized even where no social institution is involved, and stability as such is unimportant.

(3) *Efficiency in the Administration of Justice.* If every case coming before the courts had to be decided as an original proposition, without reference to precedent, the judicial work-load would obviously be intolerable. Judges must be able to ease this burden by seeking guidance from what other judges have done in similar cases.[113]

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111. On protection of stability by res judicata and related doctrines see citations in STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 250 n.110 (1964).

On the clash between the need for stability and the need for socially adaptive change as a fundamental tension in the system of precedent, see *id.* at 231-34; CARDOZO, PARADOXES OF LEGAL SCIENCE 1-30 (1928).

112. *Cf.* FULLER, THE MORALITY OF LAW 35, 51, 57-58, 79-81 (1964).

113. Karl Llewellyn observed that judicial efficiency is served in more ways than one by the system of precedent:

> To continue past practices is to provide a new official in his inexperience with the accumulated experience of his predecessors. If he is ignorant, he can learn from them and profit by the knowledge of those who have gone before him. If he is idle he can have their action brought to his attention and profit by their industry. If he is foolish he can profit by their wisdom. If he is biased or corrupt the existence of past practices to compare his action with

(4) *Equality*. By this is meant the equal treatment of persons similarly situated. It is a fundamental ethical requirement that like cases should receive like treatment, that there should be no discrimination between one litigant and another except by reference to some relevant differentiating factor. This appears to be the same value that requires rationality in judicial decision-making, which in turn necessitates that the law applied by a court be consistently stated from case to case.[114] The same value is recognized in the idea that what should govern judicial decisions are rules, or at least standards.[115] The value of equality, in any event, appears to be at the heart of our received notions of justice.[116]

(5) *The Image of Justice*. By this phrase I do not mean that any judicial decision ought to be made on the basis of its likely impact upon the court's public relations, in the Madison Avenue sense, but merely that it is important not only that the court provide equal treatment to persons similarly situated, but that, insofar as possible, the court should appear to do so. Adherence to precedent generally tends not only to

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gives a public check upon his biases and his corruption, limits the frame in which he can indulge them unchallenged.
LLEWELLYN, THE BRAMBLE BUSH 65-66 (1960).

Judicial efficiency appears to explain the existence of a doctrine of case-precedent in the civil law, despite civilian theory that "law is a solemn expression of legislative will," La. Civil Code art. 1 (1870), and that therefore codal provisions, rather than judicial interpretations of them, are to be adhered to and extended analogically. Despite these principles, once a consistent line of judicial interpretation has been established, it will normally be respected under the doctrine of *jurisprudence constante*. See, e.g., Borchard, *Some Lessons From the Civil Law*, 64 U. PA. L. REV. 570 (1916); Lambert & Wasserman, *The Case Method in Canada and the Possibilities of Its Adaptation to the Civil Law*, 39 YALE L.J. 1, 14-15 (1929).

For comparison of stare decisis and *jurisprudence constante*, see Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40 (1934); Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A.J. 11 (1929); Lobingier, *Precedent in Past and Present Legal Systems*, 44 MICH. L. REV. 955 (1946); Small, *Stare Decisis on Two Continents: A Saga of Gain and Loss*, 18 ROCKY MT. L. REV. 97 (1946).

On the struggle between the two doctrines in a mixed civil-common law jurisdiction, see Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937); Daggett, Dainow, Hébert & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 15-24 (1937).

114. This does not make it either necessary or sufficient that there should be a mere absence of logical contradictions between particular rules and decisions: What is required is that these should be "consonant" or "compatible" with each other. *Cf.* FULLER, *op. cit. supra* note 112, at 65-70, where the matter is primarily discussed, however, in terms of inconsistent statutes.

115. See PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT *passim* and especially 36-45 (1963).

116. See *id.* at 67-71.

assure equality in the administration of justice, but also to project to the public the impression that courts do administer justice equally.

Of course, each time a court adheres to a thoroughly outmoded precedent, the opposite may be true. Thus if the Supreme Court were still following *Plessy v. Ferguson*[117] in the face of radically changed attidues toward racial discrimination, the Court's consistency would hardly seem a hallmark of justice to the great majority of people, who would think the old and new decisions embodied equality only in the sense that both were equally, and fundamentally, unjust. This is not to denigrate equality, but merely to say that it is only one ingredient of justice and of the image of justice. Sometimes justice, and its image as well, require a departure from precedent; this, however, is despite the damage done to the value of equality. And equality, though it must necessarily suffer from departure from precedent, retains its character as a prime ingredient of justice, and of the image of justice, demanding protection to the extent possible. This may lead to a decision to honor precedent, especially in the absence of social change or of moral overtones to the question at issue; and, when it is necessary to reject an old decision, this value may demand that the new rule be applied to all persons similarly situated, though this requires retroactive application in some instances.

As suggested in the introduction, equality of treatment is especially important to the image of justice where ethical or moral judgments are involved. For whatever reason, men do tend to "universalize" these judgments, do claim for current notions of right and wrong a universal application.[118] There is no call here to muse upon our presistent taste

117. 163 U.S. 537 (1898).

118. See, *e.g.*, CAHN, THE SENSE OF INJUSTICE 24-27 (1949). Professor Cahn suggested that this phenomenon is associated with the human capacity for imagination, and thus tends to shade off when we contemplate injustices—whether consisting of unequal treatment or any other kind—that are sufficiently removed from our common experience by time, distance, and nature.

It should be observed, however, that even a rule devoid of ethical content cannot be applied unequally without damaging the image of justice. Llewellyn pointed out:

> I do not know why, nor do I know how, but I observe the fact that what one has been doing acquires in due course another flavor, another level of value than mere practice; a flavor on the level of policy, or ethics, or morality. What one has been doing becomes the "right" thing to do; not only the expected thing but the thing whose happening will be welcomed and whose failure to happen will be resented.

LLEWELLYN, THE BRAMBLE BUSH 65 (1960). Llewellyn suggests that this is true of applications of law as well as in matters of individual habit and social intercourse. Possibly, a partial explanation is the potential for inequality wrought by any change of law.

for absolutes in what we increasingly have come to think of as a relativistic world. The existence of the propensity is an undeniable and, I would make bold to say, rather attractive human phenomenon, an old-fashioned and socially valuable inflexibility regarding at least a few ideas about basic fairness, despite the demonstrable fact that historically these ideas do change, and within a single generation. The point is that, given this strong tendency to universalize ethical judgments, any application of different rules to persons similarly situated—when the rules embody ethical values—tends to impair the image of justice, and to undermine public confidence in the administration of law and the rule of law itself.

All of these five values are normally protected by adherence to precedent. When a precedent is overruled, and the newly announced rule is given retroactive application, as it generally has been in the common law tradition, all of these values are impaired in some degree. Institutional stability—land titles, marriage, and the like—tends at least temporarily to be disturbed, though the altered institution hopefully will be sounder in the long run. Depending on the precedential effect given the new rule, specific interests created in reliance upon perceived law are disappointed. As to efficiency, the court's other business must cease while it ponders whether, and to what extent, to reject precedent; courts owing obedience to it have a new rule to learn, and may be required to determine for themselves, subject to appellate correction, whether the new rule, once learned, is to be applied retroactively. There is a necessary impairment of equality since, even though given retroactive application, the newly announced rule is incapable of reaching some transactions that have been irremediably concluded on the basis of the old rules—as, for example, when a state convict has served a sentence or been executed under the regime of a controlling decision subsequently overruled or revised, such as *Betts v. Brady*[119] or *Wolf v. Colorado*;[120] or when a Negro child has completed a segregated education under the regime of *Plessy v. Ferguson*.[121] To this extent, impairment of the values of equality and of the image of justice are both unavoidably associated with any departure from precedent.

Prospective limitation of the new rule can, in some circumstances, reduce the impairment of some of these values, and thereby justify over-

119. 316 U.S. 455 (1942), overruled in Gideon v. Wainright, 372 U.S. 335 (1963).

120. 338 U.S. 25 (1949), overruled in Mapp v. Ohio, 367 U.S. 643 (1961).

121. 163 U.S. 537 (1896), overruled in effect in Brown v. Board of Educ., 347 U.S. 483 (1954).

ruling in circumstances that otherwise would not justify it. Thus self-correction of judge-made law is facilitated. But the impact of prospective limitation upon the five values at stake is differentiated. It is the thesis of this Article that, having decided to make a change, to overrule, in the face of these values, a court should continue to bear them in mind when deciding what effect to give the overruling decision. While all five tend to line up on the side of stare decisis, different values wind up on different sides of the next question, whether to overrule prospectively or retroactively, depending on the nature of the case. Also, in concrete cases, the five values have unequal weight, depending on the circumstances and subject-matter of the particular case.

One can generalize to the extent of saying that prospective limitation normally minimizes or eliminates impairment of the values of stability and reliance, has a varying impact on impairment of the value of efficiency in judicial administration, and (in many cases, at least) significantly increases impairment of the values of equality and the image of justice.

Stability is served by prospective limitation of a departure from precedent because a change in the legal rules affecting a social institution has less traumatic and disturbing effects upon the institution if a conscious adaptation of the institution to the new legal regime is made possible. Retroactive application of the new rule creates an interregnum during which social relations have been conducted within institutional arrangements subsequently determined to be legally vulnerable. Prospective limitation of the new rule can postpone the new regime and thereby permit conscious adaptation of the institution in sufficient time to avoid such an interregnum.

Reliance is similarly protected by prospective limitation, even though there may be no institutional interest demanding stability.

Prospective limitation of a newly announced rule tends both to promote and retard judicial efficiency. It is somewhat inconvenient in that judges will be called upon to apply two rules for a time, instead of one; but the wheels of justice are not apt to grind to a halt just because a few more rules are thrown into the works. This mild inconvenience is probably more than compensated by the advantage of not having to apply a new rule in the midst of trials or on appeal—an advantage that would accrue if the new rule were only to apply to causes of action that arose after its issuance.

Of course, the real worry, as far as judicial administration is con-

cerned, is in the criminal law area. While the system may be able to take on a few hundred new rules without a murmur, the wheels might slow perceptibly under the burden of too many thousands of full blown habeas corpus hearings and new trials. This problem is considered separately in Part IV.

The value of equality is, of course, unavoidably impaired to some extent whenever precedent is rejected. But prospective limitation of the new rule significantly increases the impairment. When a new rule is applied retroactively, all courts at any given time apply what they perceive to be the law without unjustified discrimination to all persons who come before them. And, both before and after the overruling decision, all litigants have their disputes resolved in accordance with what is then regarded as the proper rule of law. Prospective limitation, on the other hand, requires a court simultaneously to apply different rules—one of them presently acknowledged to be "wrong" in at least some types of cases[122]—to persons whose situations may be indistinguishable on any relevant basis.

The image of justice does not always suffer because precedent is overruled, even though that entails some impairment of the value of equality. Sometimes other ingredients of justice, and the image of justice, are so importantly involved that overruling does more good than harm to this value. But the impairment of equality inherent in any overruling decision, considered in isolation, always leaves scars on the image of justice. And the scars inflicted by overruling are always deeper and more extensive if the overruling is denied retroactive application, and the impairment of equality thus more pronounced.

122. I am thinking here of cases in which the new rule involves a moral or ethical judgment, and of cases in which the court intended to adhere to precedent, or to correct past error, rather than to engage in a creative law-making function. It is important here that the factual premise of the argument for the prospective limitation approach—that courts do make law—should not be mistaken for more than it is. If courts always made law, a case could be made for a general rule depriving all judicial decisions of retroactive effect, and a technique would become unnecessary. In the vast majority of cases, however, even supreme tribunals purport merely to apply pre-existing law to the facts as found. In the absence of unusually tortured distinctions of precedent, it ought not to be assumed that the courts in such cases are not doing what they purport to be doing. As one author said thirty years ago, "retroactive operation of decisions is inherent in the common-law system." Note, 47 HARV. L. REV. 1403 (1934). Although developing legal theory has rejected the inherent necessity of retroactive application, this background is not so easily disposed of. And in the rendition of countless appellate decisions, whether they apply, elaborate, augment, alter, or reject previously announced doctrine, I think the appellate court intends to declare rather than change the law. If precedent is rejected, it is more

This should be sufficient to demonstrate the differences in the impact of prospective limitation upon the values that are at stake. It is necessary, however, to distinguish also the various concrete situations in which the question of retroactive application must be decided. Prospective limitation has generally recommended itself to the courts in situations where the values of stability or reliance or both of them have been dominant and those of equality and the image of justice either not seriously impaired or relatively less important. Generally, the value of judicial efficiency has been only indifferently affected by prospective limitation; it has assumed importance only in res judicata[123] and habeas corpus cases.[124]

Despite this generalization as to the impact of prospective limitation upon the various values, they can be balanced only in a specific context since different values are differently affected and entitled to different weight in various types of cases. Thus a change in property law fairly cries out for prospective overruling. This is so first because of the obviously great societal interest in stability in this area, in land titles, for instance. Reliance too is a particularly strong value here. In property transactions, unlike tort situations, men tend consciously to rely on existing law. To disappoint expectations reasonably based on such deliberate reliance would clearly be unsound. On the other hand, though prospective limitation of an overruling decision in the property field applies different rules to persons in somewhat similar situations, it impairs the values of equality and the image of justice only slightly. First, there is a rational basis for discriminating between persons who transferred or acquired property prior to the overruling decision and those who did so afterwards. Those who did so before might and ought to have expected that their transaction would be governed by the old rule, and this is not true of those who did so afterwards.

It is essentially this analysis, or perceived bits and pieces of it, that has led courts to limit overruling decisions to prospective effect in cases involving title to property,[125] questions of personal status involving

frequently than not because it is regarded has having been erroneous *ab initio*, rather than as having become unsound with the passage of time and social change. I do not here suggest that prospective limitation is inappropriate merely because the change recognizes past error; but it is important to observe that in such cases, retroactive application causes greater impairment of the value of equality than in other cases. And this is true also, of course, of the image of justice.

123. See notes 134-43 *infra* and accompanying text.

124. See Part IV *infra*.

125. See, e.g., Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948). "The cautionary rule

the family,[126] and commercial transactions[127] precisely because it is usual for persons entering into transactions in these areas consciously to rely on, or at lease act in cognizance of, current law. Only a man who fails to ascertain the current rule, or one who has consented to its application, will be harmed; and it is reasonable to discriminate against him on the basis of his failure or consent. It is also important to note that the rules involved here are not apt to have any ethical content. Hopefully a new rule will be better, more efficient than the old, but it is not apt to be seen as "right" in the sense that makes us want to universalize it.

For purposes of illustration, this analysis may be applied to a hypothetical based on the old bond cases.[128] Suppose that bonds have been held first to have been validly issued and then, in an overruling decision, deemed invalid, and that bonds have been issued after both decisions. There is a broad institutional interest in the stability of government bonds, reinforced by the reliance of original purchasers who relied on the earlier decision; it was here that Mr. Justice Swayne declined to "immolate truth, justice and the law" by retroactive invalidation, even though a state statute was involved and a state court had "decreed the sacrifice."[129] How do equality and the image of justice fare upon prospective limitation in this situation? Because buyers in these situations are apt to act in conscious reliance on existing law, a change of law seems to be a sufficient relevant differentiating factor. While there may still be isolated pockets of widows and orphans, in these sophisticated times, who rely only on the elaborateness of the engraving on the certificate—persons as to whom the change of law is irrelevant—reliance is generally so important here that the mere opportunity to rely is a sufficient basis for discriminating between buyers.

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against overruling prior cases settling the rules of property . . . becomes eliminated when the overruling opinion reserves such rights by giving that opinion only prospective effect." *Id.* at 250, 210 S.W.2d at 788.

Some courts refuse to overrule at all in such cases on the ground that the changing of well-established rules of property is peculiarly within the province of the legislature. Nashville Trust Co. v. Tyne, 194 Tenn. 435, 250 S.W.2d 937 (1952); Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950).

126. See, *e.g.*, Bingham v. Miller, 17 Ohio 445, 448-49 (1848); Note, 71 YALE L.J. 916-17 (1962).

127. See, *e.g.*, Sunburst Oil & Ref. Co. v. Great No. Ry., 91 Mont. 216, 7 P.2d 927, *aff'd*, 287 U.S. 358 (1932); Montana Horse Prods. Co. v. Great No. Ry., 91 Mont. 194, 7 P.2d 919 (1932).

128. *E.g.*, Douglass v. County of Pike, 101 U.S. 677 (1879); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863). For a further discussion, see note 20 *supra* and accompanying text.

129. Gelpcke v. City of Dubuque, *supra* note 128, at 206-07.

Also, the new rule will not embody ethical values so that unequal treatment will tend less to undermine the image of justice.

It is difficult to generalize, but reliance is apt to be less deliberate—and thus entitled to less weight—in tort situations. And there is at least a possibility—where tort law is still bound up with notions of culpability—that the new rule will embody ethical values so that equality will be more important. This points up what would appear generally to be true: that the values of reliance and equality tend to be inversely related. The greater the opportunity for and tendency toward reliance, the less basis is there for complaint that prospective overruling treats persons unequally.

The history of Anglo-American tort law has been largely that of retroactive judicial expansion of tort liability, without concern for the tortfeasor's reliance, ever since the action on the case was first recognized—retroactively—by the fiat of the judges.[130] The weightier interest here, at least by modern standards, seems to lie with the tort victim; his plight demands compensation, even at the expense of revising precedent, and the demand has traditionally been answered in a retroactive way. The fault concept of tort liability has generally left no room for reliance. More important, the courts need not go as far to protect such reliance as may exist in this area as in the property field, because here reliance, such as it is, is at best only one-sided, and to protect it requires denial of equality to tort claimants. It seems to be generally conceded that the answer to tort harm is not self-insurance;[131] therefore people do not generally order their affairs consciously with reference to the current rules governing possible tort recovery from others in the event of injury. Thus there is no rational basis for distinguishing between tort claimants injured before and after the overruling decision. Neither group should be expected to have done or failed to do anything in cognizance of the old rule or the new one. It would be unrealistic to distinguish between the two groups on a consensual basis, so prospective limitation of the new rule would aggravate the damage done to the values of equality and the image of justice by the overruling. Here the value of reliance is thrown into direct conflict with the values of equality and the image of justice, and neither prospective

130. Fifoot, History and Sources of the Common Law 74 (1949). Possibly the example chosen is not the best, in that there is an alternative school of thought that the case was derived from chapter 24 of the Statute of Westminster II, 1285, 13 Edw. 1, ch. 24. See Field & Kaplan, Materials on Civil Procedure 224 n.d (1953).

131. See Morris, Torts 246-53 (1953); Ehrenzweig, *Assurance Oblige*, 15 Law & Contemp. Prob. 445 (1950). *But see* Prosser, Torts 568-77 (3d ed. 1964).

limitation nor retroactive application will satisfactorily protect all the interests involved. But the courts—whether or not consciously determining that the reliance value is less important—seem to have reached the best result in retroactively applying new rules expanding tort liability.

It is interesting to note that the only tort cases where the prospective limitation technique has been widely used have involved decisions overruling or limiting a rule of charitable or governmental immunity from tort liability.[132] Deliberate reliance is certainly a possible factor in these cases, in that charities or public bodies may have failed to obtain liability insurance in reliance on the old rule, thus putting them in quite a different position from a tort defendant who is merely being held liable under factual circumstances that formerly would not have given rise to liability. Presumably, one who has not previously enjoyed immunity from all liability in tort can be expected to have insured against such liability, whether it be fixed under old or new law. For example, a manufacturer previously liable to consumers for injury caused by a negligently manufactured item will most likely not suffer by extension of his liability via abolition of the privity requirement in implied-warranty actions, for his existing products liability policy should cover the new risk.

Furthermore, although the reason for prospective limitation most generally assigned in the immunity cases is reliance on the part of the class whose immunity is being abolished,[133] it seems questionable whether the same result would be reached if the overruling courts did not feel there was involved an institutional interest in stability. After all—whatever may have been the historical origin of the sovereign immunity doctrine—the justification most often advanced for both governmental and charitable immunity is the interest of society in protecting public funds and charitable funds from diversion to purposes other than those for which they were created. Prospective limitation, by affording an opportunity to secure insurance, minimizes the injury wrought to this societal interest by abolition of immunity, an injury which, at least in the case of many charities, would otherwise be severe. The injury

132. The governmental immunity cases are discussed in text accompanying notes 34-41 *supra*. Examples of the utilization of prospective limitation in overruling the doctrine of charitable immunity from tort liability are Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 131, 292 (1961); Parker v. Port Huron Hosp., 361 Mich. 1, 28, 105 N.W.2d 1, 14-15 (1960).

133. See, *e.g.*, Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 28-29, 163 N.E.2d 89, 97-98 (1959), *cert. denied*, 362 U.S. 968 (1960), quoted on this point in text accompanying note 34 *supra*.

caused to public bodies would not seem to be so drastic, for the resources available to them are generally greater, and they have more control over their future revenues. Moreover, even if a particular judgment should be in fact oppressive, as in the case of a small, poor school district, the body subjected to liability could present a compelling case for financial relief to the legislature. Of course, the large charitable foundations are also unlikely to suffer irreparable injury from the necessity of satisfying a tort judgment, but many of their smaller brethren could well be bankrupted by claims arising out of one disaster.

A somewhat different alignment of values justifies the conclusion that retroactive application of an overruling decision should be denied when, in a civil case, the earlier transaction has reached the stage of judicial finality under the doctrine of res judicata.[134] Judicial efficiency would certainly be impaired, and perhaps gravely so, by retroactive application of the new rule to cases already finally adjudicated. Since a final judgment may be translative of title, or form the subject matter of commercial dealings, there are institutional demands for its stability, and there may be individual reliance upon it, as in the case of rules of property or of contract law.

Equality and the image of justice are impaired to some extent by refusal to give retroactive application to the newly announced rule, but this is ameliorated by the consideration that the final judgment itself provides some basis for distinguishing between those who have litigated, to whom the old rule remains controlling, and those who have not, and are permitted to invoke the new rule. But the distinction is a procedural one, and not entirely satisfying; the values of equality and the image of justice have induced some malaise or queasiness when res judicata has triumphed over a subsequently announced rule, and especially so when the new rule has an ethical content, and thus asserts a claim to universal applicability. It may not be too much to suggest that the dynamic expansion of the scope of habeas corpus,[135] at the expense of judicial finality in the criminal field, is at least in part attributable to the ethical quality of concepts such as due process and fairness of trial.

Even in civil cases, and with regard to newly announced rules having little or no ethical content, the values of equality and the image of justice have competed fairly vigorously with the doctrine of judicial finality. Courts are reluctant, for example, to sustain a plea of collateral

134. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

135. See Part IV *infra*.

estoppel[136] after an intervening rejection or revision of a controlling precedent. In some cases, of course, a plea of collateral estoppel will relate to a transaction that occurred after the overruling decision, but in others, the transaction will have intervened, so that collateral estoppel is competing with retroactive application of the new rule. The American Law Institute's *Restatement of the Law of Judgments* would apply the new rule retroactively here, "except where both causes of action arose out of the same subject matter or transaction; and in any event . . . if injustice would result" [137] from applying the old rule embodied in the prior adjudication urged as conclusive. No one, of course, has been able to capture the precise meaning of the "injustice" phraseology; if injustice means simply a denial of equality, retroactive application would always be required. While the *Restatement* clearly contemplates something less than this, courts have recognized that equality, at least in some cases, requires rejection of collateral estoppel, and that intervening as well as later transactions be governed by the new rule. Thus collateral estoppel is rejected after the intervention of an overruling decision, or even an appreciable change in the "legal atmosphere" resulting from a decision that does not overrule, in federal tax litigation,[138] customs litigation,[139] and other areas where one of the litigants is a member of an easily discernible class currently competing for survival in the new legal environment.[140] A final judgment holding, for example, that income during 1929-1931 under a term assignment of a royalty contract is not taxable to Mr. Sunnen survives the arrival on the scene, by judicial decision in 1940, of the *Clifford-Horst*[141] doctrine, under the rule of res judicata. But tax liability for income under the same assignment during the year 1937 is imposed retroactively on Mr.

136. I am using Professor Austin Scott's and the Restatement's phrase to refer to the doctrine that a final judgment is conclusive between the parties and their privies of material issues that were litigated and adjudicated in other litigation between them not involving the same cause of action, but involving a common issue. See RESTATEMENT, JUDGMENTS § 68 (1942); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

137. RESTATEMENT, JUDGMENTS § 70 (1942).

138. Commissioner v. Sunnen, 333 U.S. 591, 599-607 (1948); Bush v. Commissioner, 175 F.2d 391 (2d Cir. 1949).

139. United States v. Stone & Downer Co., 274 U.S. 225 (1927); United States v. Boone, 188 F.2d 808 (C.C.P.A. 1951).

140. *E.g.*, Grandview Dairy, Inc. v. Jones, 157 F.2d 5 (2d Cir.), *cert. denied*, 329 U.S. 787 (1946) (involving statutory classification of a milk products plant for milk supply regulation purposes).

141. Helvering v. Horst, 311 U.S. 112 (1940); Helvering v. Clifford, 309 U.S. 331 (1940).

Sunnen under the *Clifford-Horst* doctrine,[142] although in the absence of the 1940 change of decisional law, he would be protected by the collateral estoppel effect of the earlier judgment. The explanation appears to lie in the idea that Mr. Sunnen must be treated equally with taxpayers similarly situated, and the conclusive effect of the earlier judgment therefore should be limited narrowly to the cause of action adjudged. It has been suggested that collateral estoppel should never apply after an intervening change of law.[143]

Mention of the retroactive impact of the *Clifford-Horst* doctrine suggests one other area in which prospective limitation has sometimes seemed appropriate, apparently because of prevalence of the value of reliance, but perhaps also in recognition of an institutional demand for a new kind of stability to facilitate commercial transactions. Mr. Sunnen, we may hope, was not detrimentally affected by his reliance on the tax law obtaining prior to *Helvering v. Clifford*[144] and *Helvering v. Horst*;[145] his term assignment was to his wife, and those decisions perhaps merely undid, for tax purposes, what Mr. Sunnen hopefully thought he had accomplished. But increasingly large and complex business transactions are built around predicted application of tax law. Many such transactions, I think it is safe to say, would take entirely different forms, or be scotched completely, but for their anticipated tax consequences. Transfers of immense mineral properties in the oil and gas industry, for an instance, frequently would not take place but for the tax treatment of the "ABC" transaction, affording long-term capital gain taxation to the vendor, and avoidance of income tax liability to the vendee on a significant proportion of the income from the property that is devoted, in effect, to paying the unpaid balance of the purchase price.[146] Reliance on announced law is here present in its most full-blown form, and this is recognized by the Internal Revenue

142. Commissioner v. Sunnen, 333 U.S. 591 (1948).

143. Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 Iowa L. Rev. 217, 240-41 (1954). Another and, I think, preferable position is that "a judgment should have collateral estoppel effect as to causes of action that existed at the time of its rendition, but its *prospective* effect as collateral estoppel, in suits on subsequently arising claims, should not be extended beyond a change in the applicable law." 1B Moore, Federal Practice ¶ 0.448, at 4241 (2d ed. 1965).

144. 309 U.S. 331 (1940).

145. 311 U.S. 112 (1940).

146. See Appleman, *The ABC Deal*, 11 Institute on Oil & Gas Taxation 519 (1960); Benjamin & Currier, *The Supreme Court and Taxation of Oil, Gas, and Production Payments: The Lake Cases*, 19 La. L. Rev. 579 (1959); Galvin, *The "Ought" and "Is" of Oil-and-Gas Taxation*, 73 Harv. L. Rev. 1441 (1960).

Service's current practice of giving advance determinations of the taxability of such transactions, upon application from the interested persons.[147] For the same reason, protection of reliance strongly demands that any overruling decision affecting such planned transactions (or transactions of types that are likely to be tax-planned) be denied retroactive application, at least as to them. Actual reliance, or the great likelihood of it, appears to be a sufficient differentiating factor to justify discrimination between transactions that do and those that do not reflect reliance. Consider, for example, the difference between the planned property transfer just described as to which denial of retroactive application may seem the best result,[148] and the transfer of property (if we may call it that) by embezzlement in *James v. United States*.[149] In *James*, the Court overruled *Commissioner v. Wilcox*[150] to hold that the proceeds of embezzlement are taxable income to the embezzler in the year of the embezzlement, but reversed a conviction of James for willful failure to report income. James was saved by a combination of three Justices who thought the *Wilcox* case should have been adhered to and three other Justices who thought, in effect, that the new rule should not be applied retroactively in a criminal prosecution.[151] While there is language in *James* suggesting that the embezzler there had relied on *Commissioner v. Wilcox* in failing to report income in the year of the embezzlement,[152] it seems clear that the embezzlement itself

147. The widespread practice of issuing rulings on the tax impact of prospective transactions is closely regulated, see generally 26 C.F.R. § 601.201 (Supp. 1964). There appears to be no clear statutory authority for the issuance of such rulings, though some support for the practice can be found in INT. REV. CODE OF 1954, § 7805(b), which authorizes the issuance of rulings that have no retroactive effect. See Yager, *When and How Should the Practitioner Ask for Rulings and Technical Advice?*, 14 J. TAXATION 38-39 (1961).

148. Arizona State Tax Comm'n v. Ensign, 75 Ariz. 376, 257 P.2d 392 (1953); Duhame v. State Tax Comm'n, 65 Ariz. 268, 179 P.2d 252 (1947); *cf.* German Gymnastic Ass'n v. City of Louisville, 306 Ky. 810, 209 S.W.2d 75 (1948) (decision denying tax exemption not retroactive, because of reliance on prior judicial determination); Board of Equalization v. Tulsa Pythian Benevolent Ass'n, 195 Okla. 458, 158 P.2d 904 (1945); Gibson v. Phillips Univ., 195 Okla. 456, 158 P.2d 901 (1945).

For a particularly hard case in which the court refused to protect the taxpayer's reliance interest by prospective limitation, see People *ex rel.* Rice v. Graves, 242 App. Div. 128, 273 N.Y. Supp. 582 (3d Dep't 1934), *aff'd mem.*, 270 N.Y. 498, 200 N.E. 288, *cert. denied*, 298 U.S. 683 (1936).

149. 366 U.S. 213 (1961), also discussed in text accompanying notes 170-74 *infra*.

150. 327 U.S. 404 (1946).

151. See Part IV *infra*.

152. 366 U.S. 213, 221-22 (opinion of Warren, C.J.); *id.* at 245 (Harlan, J., concurring).

was not a tax-planned transaction; James and others like him may be surprisingly knowledgeable about the criminal law, but below the Al Capone echelon generally are not closely conversant with tax law. Civil tax liability, it seems certain, might be retroactively imposed by the *James* decision upon the proceeds of earlier embezzlements without any disturbing injury to the values of stability and reliance. In *James* itself, despite discussion in terms of reliance by various members of the Court, denial of retroactive application seems to have resulted from a different consideration, applicable only to criminal cases, as I will attempt to show in Part IV.

I would like to conclude this somewhat random discussion of the values to be weighed in deciding whether a decision should be given only prospective effect by considering a pair of United States Supreme Court cases that announced "new" rules, but were cases of first impression rather than overruling decisions. Prospective limitation was suggested in one, *Mosser v. Darrow*,[153] and granted in the other, *England v. Louisiana State Board of Medical Examiners*.[154] The cases are interesting not only because they are among the few Supreme Court cases dealing with retroactivity but also because they raise a new problem: Is prospective limitation proper in non overruling cases and, if so, in which ones? The problem is, of course, that almost every law suit involves some slight departure from, or extension, or at least modulation, of old law. And in a multitude of cases one party will have erroneously relied on his view of existing law, a reliance which will be undercut when his opponent's version of the law is applied to the loser's case. It seems clear that in the normal course such reliance should not warrant prospective limitation. Absent a departure from old law so surprising as to be tantamount to an overruling, or absent an extraordinary interest in stability or reliance, non overruling decisions should be given retroactive effect. The business of the courts, after all, is primarily to dispose of controversies, not to legislate prospectively on a multitude of specific issues, many of which will never come up again. Consider, in this context, the *Mosser* and *England* cases.

In *Mosser*, the Court announced and imposed for the first time a rule of substantive liability upon a reorganization trustee for profits he had innocently permitted corporate employees to make by trading in securities of the corporation in reorganization. Mr. Justice Black un-

153. 341 U.S. 267, 275 (1951) (Black, J., dissenting).

154. 375 U.S. 411 (1964).

successfully contended that prospective limitation was in order.[155] The case was one in which it seems that the principal value demanding prospective limitation was protection of reliance; the trustee might reasonably have perceived and in fact apparently did perceive that his conduct was in accordance with what the law required. He was disappointed. But a line must be drawn somewhere; almost every law suit suggests that someone has misapprehended what the law required him to do or not to do. Rather than impair the values of equality and the image of justice, it seems to have been a preferable choice to subject Mr. Darrow to what Mr. Justice Cardozo called the risks inherent in the game of life.[156]

There was not the special interest in reliance or even the "constructive reliance" that may be said to exist in cases imposing a contemporaneously announced criminal liability, nor was there any extraordinary interest in stability. While Mr. Justice Black did not mention it, it might be urged that there is a special interest in stability here, in that the trustee is a court-appointed official carrying out a quasi-public duty. Thus there is at least a degree of interest in protecting his reliance so that capable men will continue to undertake such duties and the stability of court-supervised reorganization proceedings be fostered.[157] However, the majority felt that there were other and adequate ways in which the trustee could protect himself and proceeded to impose a hefty $43,000 surcharge on him even though his error was innocent, and even though he derived no benefit from the improper transaction.

In the *England* case,[158] the Court announced a rule that, in an abstention case, a state court's judgment deciding a controlling federal question bars relitigation of that question in the federal district court, unless a party has preserved the question by expressly reserving it in the court. However, the plaintiffs in *England*, reasonably though erroneously

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155. Mr. Justice Black saw possible virtues in the new rule, but felt:

> [T]here is no reason why the rule should be retroactively applied to this respondent when to do so is grossly unfair. Admittedly, the most that can be said against respondent is that he made an honest mistake which before today would not have subjected him to the heavy financial penalty. Under these circumstances, if the new rule is to be announced by the Court, I think it should be given prospective application only.

341 U.S. at 276.

156. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148 (1921).

157. If *Mosser v. Darrow* had been an overruling decision, imposition of liability would have been quite closely analogous to the problem posed by retroactive imposition of civil liability upon a public official for acts done in this official capacity, discussed in text accompanying notes 91-96 *supra*.

158. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

relying upon a distinguishable Supreme Court decision,[159] had presented and litigated the federal question in state court, so the new rule was not applied to them. The Court was impressed by the fact that numerous legal writers as well as the court below and the plaintiffs had read the previous Supreme Court decision as *compelling* parties to litigate federal issues in the state court, while in fact the Supreme Court had only meant to require that the parties indicate the federal issues so that state courts might settle state questions in the light of the pending federal issues. Only one commentator had guessed right as to the meaning of the prior decision.[160] Presumably the Court felt that this was one of the rare situations in which a new rule makes a sufficiently unforeseeable departure from existing law to warrant prospective limitation. It should be pointed out also that prospective limitation cost the opposing party only time and a procedural defense; while retroactive application would have cost plaintiffs the case, and deprived them of a federal trial, a statutory right that the new rule was intended to preserve for those who wished to have it.[161] In these circumstances, the competing values of equality and the image of justice were hardly impaired by giving the plaintiffs their day in federal court.

## IV. Retroactivity, Criminal Law, Due Process, and Habeas Corpus

As is appropriate in a nation that sets the highest store by individual life and freedom, we have always in this country treated the imposition of criminal sanctions with considerable care. The preservation of individual life and individual freedom is one of the fundamental objects—perhaps the ultimate object—of our mode of government. And this continues to be true, for all that our frontiers are behind us and for all that ours is now a massive industrial society, intricately and increasingly interdependent. These values persist. And it is fitting that a society which stakes so much on individual worth should approach the taking of one man's freedom with extraordinary, indeed with ritual care, for in this country as in no other it should be and is a solemn undertaking. There is no need to catalogue the incidence of this concern in the Constitution, no need to recapitulate recent Supreme

159. Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957).

160. See Note, 73 Harv. L. Rev. 1358, 1364-65 (1960).

161. Under the *England* rule, the party given a right to a federal trial may preserve it even in an abstention case, as to federal issues, by expressly reserving it in state court. 375 U.S. at 421.

Court decisions reflecting our still growing concern with personal liberties.

To a nation with this wholesome preoccupation, the mere expression and publication of criminal laws require careful handling. (I have reference to the high requirements of clarity in drafting criminal laws,[162] the void-for-vagueness doctrine,[163] and the requirement that the possibility of certain things being criminal be reasonably foreseeable.[164]) *Changes* in the criminal law pose problems of the greatest delicacy. However remote the danger of abuse in fact at this time, a change of criminal law has a potential for evil—for legislative elimination of individual rivals or factions by passage of retroactive criminal statutes—which would undercut our basic institutions, or indeed any possibility of limited government.[165] The founding fathers addressed themselves

162. See notes 174-78 *infra*, for a few examples.

163. See, *e.g.*, Kunz v. New York, 340 U.S. 290 (1951); Herndon v. Lowry, 301 U.S. 242 (1937); Note, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960), in SELECTED ESSAYS ON CONSTITUTIONAL LAW 560 (1963). It is worth noting that most of the void-for-vagueness cases involve criminal statutes that arguably outlaw conduct protected by the first amendment; in their common tendency to curb governmental suppression of the opposition, the void-for-vagueness doctrine and the prohibition of ex post facto legislation are closely related.

164. See Lambert v. California, 355 U.S. 225 (1957) (ordinance penalizing failure to register as a convicted felon, without element of willfulness, held unconstitutional), 56 MICH. L. REV. 1008 (1958); *cf.* Smith v. California, 361 U.S. 147 (1959) (ordinance penalizing booksellers whether they knew contents of books or not held unconstitutional).

165. See HART, THE CONCEPT OF LAW 202 (1961):

> [A] minimum of justice is necessarily realized wherever human behavior is controlled by general rules publicly announced and judicially applied. . . .
>
> Further aspects of this minimum form of justice which might well be called "natural" emerge if we study what is in fact involved in any method of social control, . . . which consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. This means that, for the most part, those who are eventually punished for breach of the rules will have had the ability and opportunity to obey.

It should be mentioned that Professor Hart's general view does not extend to certain Nazi criminal statutes and decisions for reasons which are discussed in Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618-19 (1958). See also HART, *op. cit. supra* at 254-55 for Professor Hart's "corrected account" on this matter.

For a more sweeping view of the need to limit retroactivity, see Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 651 (1958): "A general increase in the resort to statutes curative of past legal irregularities represents a deterioration in that form of legal morality without which law itself cannot exist. The threat of such statutes hangs over the whole legal system, and robs every law on the books of some of its significance."

to the danger in forbidding ex post facto legislation,[166] but did not impose similar limits on the courts. In this generation we have not only seen ex post facto legislation used to newly monstrous effect,[167] but we have seen that courts as well as legislatures are to be feared in this regard.[168] The United States Supreme Court has not lately taken up the problem of retroactive judicial changes, although such changes have been upheld in the past,[169] perhaps because the declaratory view of decision-making was controlling at that time.

That there are special problems about the retroactive application of a change which *expands* criminal responsibility is fairly obvious. That there are similar problems about failure to give retroactive effect to changes which limit criminal responsibility is less obvious, but, I think, equally true.

As to judicial changes which expand the substantive criminal law, the values seem to line up on the side of prospective limitation, but to be overshadowed by the principle prohibiting ex post facto criminal law-making, which demands the same result in any event. Stability, here as in other areas, would be impaired to the extent that social institutions are involved. Reliance on the old law, where it exists, would be disappointed in the most devastating way by retroactive application, although this is not an area where people are apt to have acted in reliance on perceived law. Judicial efficiency is fostered by prospective

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166. U.S. CONST., art. I, § 10.

167. The history of the Nazi Germany provides a stark example in Hitler's "Roehm Purge" of 1934. After this slaughter of over one hundred persons, the puppet cabinet "legalized" the action as a measure necessary for the defense of the state. Two weeks after the purge, Hitler told the Reichstag: "If anyone reproaches me and asks why I did not resort to the regular courts of justice, then all I can say is this: In this hour I was responsible for the fate of the German people, and thereby I became the supreme judge of the German People." FULLER, THE MORALITY OF LAW 54-55 (1964); see SHIRER, THE RISE AND FALL OF THE THIRD REICH 225-26 (1959).

The Chinese have also retroactively legitimated the slaughter of vast numbers of middle-class landowners by the simple expedient of outlawing them: "In late 1952 Communist Minister of Finance Po I-po publicly admitted that the Reds had liquidated 2,000,000 'bandits' in the preceding three years. Some Western experts calculate that 14 million Chinese were executed during the land reform of 1951 alone." Time, Dec. 1, 1958, p. 22, col. 3.

168. See SHIRER, *op. cit. supra* note 167, at 268-70.

169. Frank v. Mangum, 237 U.S. 309 (1915); *cf.* Ross v. Oregon, 227 U.S. 150 (1913) (decision in case of first impression). Compare Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) (retroactive overruling decision did not violate contracts clause). *But see* Douglass v. County of Pike, 101 U.S. 677, 687 (1880) (dictum). For further comment on *Mangum*, see note 12 *supra*.

limitation, in the rather minimal sense that old activities will not be brought before the courts. Equality may be impaired, in that persons who did the same acts before and after the overruling decision—who may have been equally ignorant of it in fact—are treated differently; but the one who acted later is properly differentiated, if one does not boggle at the maxim that ignorance of the law does not excuse, because he had the opportunity to know that his conduct would be criminal. Finally, the image of justice quite obviously will not tolerate retroactive application of criminal responsibility, for the same reason that the ex post facto principle will not.

Not many examples of overruling decisions expanding criminal responsibility come to mind; most that do involve the reinterpretation of statutes. We tend to be somewhat more Blackstonian in interpreting statutes, as opposed to the common law or constitutions, for the statute is "there" in a way that the "brooding omnipresence" is not. Still, courts do "make" statutory law, clearly enough, and should not fasten on the old conceptualism to leave the way open for immense wrongs, however remote the present risk.

Supposing a situation in which a court is trying to update a common law crime, rather than a statute, to meet changed circumstances, prospective limitation is still in order. For one thing, it is difficult to believe that, all these millenia after our fall from grace, the criminal mind will concoct some new wrong which will call for retroactive application of new laws. Society and malefactors have been at the ancient game too long for such a situation to arise.

In the *James* case,[170] discussed above,[171] the Court did in effect limit a judicial broadening of the substantive criminal law to prospective effect, but the Justices who wanted to do so put most of their emphasis on reliance. While the result seems altogether correct, that emphasis seems somewhat misplaced. In *James*, the Court overruled *Commissioner v. Wilcox*[172] to hold that embezzled money is taxable as income in the year of embezzlement; presumably because *James* was a criminal prosecution (for willful failure to report income), a majority of the Court was unwilling to apply the new rule retroactively.[173] Mr. Chief

170. 366 U.S. 213 (1961).

171. See notes 103-07 *supra* and accompanying text.

172. 327 U.S. 404 (1946).

173. The breakdown was as follows: Chief Justice Warren, joined by Justices Brennan and Stewart, thought *Wilcox* should be overruled, but voted to reverse James' conviction because "the element of willfulness could not be proven in a criminal

Justice Warren, in urging this result, suggested the possibility that James had failed to report embezzled money as income in reliance on the *Wilcox* decision. Justices Harlan and Frankfurter would have remanded for a new trial to see if this was so, suggesting that it would be proper to convict James of willful failure to report income if it turned out that he had not relied on the *Wilcox* decision.[174] Yet it seems quite likely that a new trial for this purpose would have been ceremonial only, that even in the unlikely event James had ever heard of the *Wilcox* decision, his failure to report the fruits of his crime to federal tax authorities probably resulted from his fear that this would lead to conviction for embezzlement. Of course, if a person does in fact act in reliance upon contemporaneous law legitimating certain conduct, the strongest kind of case can be made out for protecting such reliance. All I mean to say is that, since ignorance of the criminal law is no defense, and since such ignorance is common, reliance alone is not adequate to explain the *James* decision, or even the ex post facto clause itself.

In the converse situation, where an overruling decision narrows the substantive criminal law—either by ruling that certain conduct is not covered by a statute[175] or that a statute is unconstitutional[176]—I believe that retroactive application is appropriate. At first blush this may seem to be inconsistent with the preceding section, a "heads I win, tails

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prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed." 366 U.S. 213, 221-22. Justices Black and Douglas would have retained *Wilcox*, and voted to reverse on that basis. They further objected to the "prospective way" in which *Wilcox* was overruled. *Id.* at 223. Justice Whittaker substantially agreed with them, in a separate opinion. *Id.* at 248. Justices Harlan and Frankfurter agreed in the overruling of *Wilcox*, but would have remanded for new trial to determine whether James had relied on *Wilcox* and thus, whether the element of "willfulness" was present. *Id.* at 241. Justice Clark favored overruling *Wilcox* and affirming the conviction. *Id.* at 241.

174. *Id.* at 241.

175. In two cases of this kind, the Court of Appeals for the District of Columbia imposed limitation to prospective effect. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) (adopting narrower view of criminal responsibility and applying it to reverse Durham's conviction, but otherwise limiting it to prospective effect); Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941). In *Warring*, the court refused to apply a narrower construction of a criminal contempt statute, adopted in Nye v. United States, 313 U.S. 33 (1941), to conduct that occurred before *Nye*, under the regime of Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

176. Retroactive application has generally been given in this situation. See Partain v. State, 77 Okla. Crim. 270, 141 P.2d 124 (1943); Hawaii v. Merseberg, 35 Hawaii 248 (1939); Note, 60 HARV. L. REV. 437, 446 (1947); *cf.* Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

you lose" proposition whereby the criminal always goes free and society always takes a risk. I suggest, however, that this result will be shown to be correct by a consideration of the dominant relevant values.

Equality and the image of justice are the values that most obviously assert themselves in this situation. The conduct involved may or may not have been morally reprehensible, but as a matter of record society has not in fact prescribed criminal punishment for it, or society was constitutionally powerless to do so, or at least to do so in the particular way attempted. If the overruling decision is based on constitutional grounds—that the statute invades freedom of speech or association, for example—the decision is apt to invoke an ethical judgment, and thus, as has been suggested, is apt to have a special claim to universal applicability.[177] Even if it does not, the overruling decision will very likely be conceived as an admission of past error, rather than a creative exercise of the judicial function to accommodate changed social conditions.[178] The overruling court will normally be saying that the statute never meant what the old precedent took to be its meaning, or that, despite the earlier decision, it has since become clear that the legislature did not, from the beginning, have constitutional power to enact the statute that it did.[179] In these situations equality insists that present and past conduct be treated alike; to imprison, or possibly to execute, a person for having engaged in conduct presently acknowledged to have been innocent in the doing (despite any intent to violate the statute) is unconscionable.

On the other side, the values that are most clearly damaged by retroactive application in this situation are protection of reliance—taken in the very broad sense of encouraging obedience, and therefore discouraging disobedience, of law as contemporaneously announced[180]—and stability. Our protagonist is, after all, a criminal in spirit in that, whether through ignorance or hardened disregard, he flouted what then appeared to be the law, and only rarely will he have done so to raise a

177. See note 118 *supra* and accompanying text.

178. Thus the rationale of a narrower test of criminal responsibility would seem to lie in recognition of newly discovered psychological insights, rather than an evolving acceptance of criminal conduct caused by "irresistable impulse." See Durham v. United States, 214 F.2d 862, 869-74 (D.C. Cir. 1954).

179. This does not mean that the prospective limitation technique is irrelevant; it is a valuable instrument even in cases of this kind. See text accompanying note 146 *supra*. But the impairment of the values of equality and the image of justice is increased in such cases. See note 72 *supra*.

180. The value is not limited to encouragement of obedience, see note 62 *supra* and accompanying text, but this appears to be a major ingredient.

test case. Additionally, retroactive application of a decision upsetting a substantive criminal law creates an interregnum, a period during which social institutions responsible for public peace have operated on the assumption that the conduct in question had been validly outlawed. This may have forestalled other legislative efforts to control the same conduct. Finally, retroactive application of the new rule will increase the impairment that overruling causes to the efficiency of judicial administration, since the new rule will have to be applied to cases already in the channels of appellate review, and, if the law provides a post conviction remedy of sufficient flexibility,[181] past convictions will have to be reexamined.

Despite these considerations, the violations of the values of equality and the image of justice that would accompany prospective limitation in this situation are so harsh that I urge without hesitation that an overruling decision abrogating or contracting criminal responsibility ought to be given full retroactive sweep.[182]

It is necessary at this point to recognize that full retroactive sweep in criminal cases may be fuller than in civil cases because of limitations that have been imposed upon the finality of criminal judgments of conviction. It is established doctrine that an overruling decision does not deprive a civil judgment of its effect as res judicata,[183] even though the judgment was based upon the precedent subsequently overruled. Stability, judicial efficiency, and in some cases protection of reliance are the values that have prevailed, at some expense to the values of equality and the image of justice.[184] (The balance appears to be an uneasy one even in civil cases; it tends to go the other way when the collaterally conclusive effects of a civil judgment are in issue.[185]) Because of habeas corpus and similar writs, judicial finality in criminal cases is relegated to a much lower estate than in civil. A criminal judgment of conviction does not enjoy the same degree of finality until the convicted defendant has been executed, died in prison, or been released. And because of the possibility of subsequent reimprisonment under multiple offender laws, the judgment of conviction

181. At present, federal habeas corpus appears to require that the convictions have resulted from a denial of due process. See notes 187-88 *infra*.

182. *Contra*, Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941); Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954) (dictum).

183. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

184. See text accompanying notes 128-29 *supra*.

185. See text accompanying notes 136-43 *supra*.

may ultimately be attacked by habeas corpus at some future time as long as the convicted defendant draws breath.[186]

The relevant ground for release under the federal habeas corpus statute is that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." [187] It seems possible that the relative importance of the various values is somewhat different in the habeas corpus than in the appeal context. Assuming that habeas corpus is procedurally available,[188] I believe that the overruling decision should be given retroactive effect on habeas corpus, although the values so impaired are more prominently involved here than when retroactive application is sought by appeal. Equality and the image of justice both demand just as vehemently that the prisoner be released; that his conviction became final before the overruling decision is, from the prisoner's point of view, no more a relevant differentiating factor than that the conduct for which he is being punished was committed before the same

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186. See U.S. *ex rel.* Durocher v. LaVallee, 330 F.2d 303 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964).

187. 28 U.S.C. § 2241 (c)(3) (1958).

188. If release is sought by a prisoner in federal custody, it appears that retroactive application of the new precedent would fall within the statute. As a matter of semantics, he is being held in custody in violation of the "laws" of the United States if the overruling decision reinterprets the criminal statute to exclude the conduct that the prisoner was convicted of having committed. If the overruling decision held the statute unconstitutional, the prisoner is being held in custody "in violation of the Constitution." If a state statute or constitutional provision provides for release under habeas corpus when a prisoner is held in custody under similar conditions with regard to the state's constitution or laws, it would appear that state habeas corpus would have the same scope, whether the overruling decision reinterpreted the statute, held it to violate the state constitution, or (because of the supremacy clause) held that the state statute violated the federal constitution or federal treaties or laws.

Whether federal habeas corpus would be available for release of prisoners in state custody in all of these situations is a more difficult question. If the overruling decision held the criminal statute was in violation of the federal constitution or federal treaties or laws, it seems clear that the federal writ should issue, in light of the supremacy clause. If, however, the overruling decision imposes a narrower interpretation upon the criminal statute, or holds it invalid because in conflict with the state constitution or repealed by other state legislation, I am not at all sure that the prisoner's continued detention is remediable by federal habeas corpus. In civil cases, at least, Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), held that the fourteenth amendment due process clause does not compel a state to give retroactive effect to her own judicial departures from precedent. Here, as in *Sunburst*, it appears that the law involved is all state, unless it can be successfully urged that fourteenth amendment due process or equal protection tolerate the thoroughly reasonable discrimination made in *Sunburst* but do not tolerate the similar (albeit less rational) differentiation made by prospective limitation of an overruling decision narrowing criminal responsibility under state law.

overruling decision. In either event, he is being punished for conduct now regarded as never having been validly denounced as a crime.

The values of stability, protection of reliance upon contemporaneously announced law, and judicial efficiency all make claims of some sort that overruling decisions narrowing criminal liability be denied retroactive effect in habeas corpus proceedings. This is also true of overruling decisions expanding the scope of due process as a protection to persons accused of crime, a situation subsequently discussed.[189] The involvement of these values in the context of criminal habeas corpus is, of course, clearly different from their involvement when the question is retroactive application of a new rule of property or contract law, or the like. The warden-prisoner relationship is a manifestation of a social institution, but it asserts a very different claim to stability than do the institutional arrangements of the family, land titles, commercial transactions, or other administrative governmental institutions. The institution is judicial, and that institution's claim to stability is normally manifest in the doctrine of res judicata. But the writ of habeas corpus suggests that the judicial institution's claim to stability is less in criminal than in civil cases, even though the writ primarily sanctions instability caused by known or knowable misapplications of law and denials of due process, and does not directly contemplate the retroactivity problem.

In any event, when the rule for which retroactive effect is sought is one establishing that the prisoner's conduct was not criminal, it is not at all clear that the impairment to stability is any greater in the habeas corpus context than it is in the context of an appeal, except for the difference in the number of cases affected. If the criminal statute has been declared invalid, or reinterpreted so that it clearly cannot cover the prisoner's conduct, it is difficult to see how the passage of time, or dissipation of evidence, will frustrate the judicial institution; since the prisoner ought never to have been prosecuted anyway, it does not seem to matter that he cannot be reprosecuted. The situation may not be so clear-cut, however. Quite possibly, the prisoner was found guilty by a general verdict in response to instructions that permitted the verdict on alternative theories, only one of which has been later held not to be within the statute. In such a case, it will not be possible to determine to a certainty that the prisoner's conviction was for activity now regarded as innocent. And the judicial institution, having operated consistently with the framework of perceived law, will be frustrated

189. See text accompanying notes 191-92, 198-200 *infra*.

because reprosecution may now be impracticable or impossible. Because of the greater time lapse involved, this is a consideration that applies to habeas corpus more strongly than to appeal.

Judicial efficiency and protection of reliance tend to blend with the value of stability in this context. Stability seems to be in a sense society's interest in protecting its own institutional reliance on announced law, and protection of reliance by the judicial institution is, in part at least, for the protection of that institution's efficiency. But judicial efficiency is broader than the value of stability in at least this sense: Numerous habeas corpus applications and reprosecutions because of the decision to apply new precedent retroactively may impose an added burden on the judicial institution; but this burden can be alleviated without denying retroactive application in habeas corpus cases by legislation increasing the capacity of the institution.

The impairments of stability, judicial efficiency, and reliance wrought by retroactive application on habeas corpus of a new precedent contracting criminal responsibility do not, on the whole, seem to be much greater than those encountered when the new rule is applied retroactively on appeal. The values of equality and the image of justice, on the other hand, are equally vocal in demanding retroactive application in both instances. That the liberty or life of the individual is involved makes these demands even more insistent, and it is not difficult to conclude that in either instance the prisoner who is innocent of crime under the newly announced rule should be released.

Now we are come to the question of the effect to be given overruling—or at least "new"—decisions which expand constitutional protection of persons accused of crimes. As to most of these developments, the decision has already been made in favor of retroactivity, even where convictions have become final. In point are the decisions expanding the right to counsel,[190] the indigent's right to a free transcript where necessary to an appeal,[191] and the right to exclusion from evidence of confessions regarded as voluntary when made but subsequently held to

190. Escobedo v. Illinois, 378 U.S. 478 (1964); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963). The rule announced in *Gideon* was applied retroactively on habeas corpus in Doughty v. Maxwell, 376 U.S. 202 (1964) (per curiam), and in Pickelsimer v. Wainwright, 375 U.S. 2 (1963) (per curiam).

191. Griffin v. Illinois, 351 U.S. 12 (1956), applied retroactively on habeas corpus in Eskridge v. Washington State Bd., 357 U.S. 214 (1958). But in Norvell v. Illinois, 373 U.S. 420 (1963), release on habeas corpus on the basis of *Griffin* was denied because no one was able to transcribe the notes of the court reporter, who had died, and the witnesses were unable to remember what had happened at the trial.

be coerced.[192] The possibility of refusing retroactive application is never directly discussed by the Court in these cases,[193] but it seems clear what the relevant values were.

The first thing to note is that all of these rules are concerned directly with "equality"—though not in quite the sense which we have used the word—in that they are designed to screen out irrelevant factors in the adjudication of guilt or innocence. Thus they screen out effects of indigence, coercion in the pretrial stage, and the like, because these elements are irrelevant to and tend to impede the finding of a just verdict. The upshot, of course, of suffering these factors to play a part is that people in like circumstances are apt to be treated differently in the absence of any relevant differentiating factor. Certainly the rejected rule had no greater tendency to provide adequate differentiation between innocent and guilty before the overruling decision than it has afterwards. Because these rules are concerned with promoting fundamental fairness, they have substantial ethical content. At least where the denial of a procedural right has appreciably increased the risk of a miscarriage of justice, the values of equality and the image of justice urgently call for making the new rule retroactive.

Rather than dwell on the above situations, I propose to proceed to the *Mapp v. Ohio*[194] problem which, it seems to me, involves similar considerations. Just as habeas corpus presents a harder case for retroactive application than does a direct appeal from a judgment of conviction, *Mapp* presents a harder case in the context of habeas corpus than the other departures from precedent that expand the constitutional requirements of criminal procedure. *Mapp* held that exclusion of evidence obtained in violation of the fourth amendment is a requirement of due process imposed upon state criminal prosecutions by the fourteenth amendment, and thereby revised the precedent previously established in *Wolf v. Colorado*[195] on this subject. But to understand the development of the *Mapp* doctrine, it is necessary to consider four different periods. During the first, prior to *Weeks v. United*

192. *E.g.*, Rogers *v.* Richmond, 365 U.S. 534 (1961), which was applied retroactively on habeas corpus to invalidate a 1936 conviction in Reck v. Pate, 367 U.S. 433 (1961).

193. It is occasionally mentioned in concurring or dissenting opinions, as in Justice Frankfurter's concurring opinion in Griffin v. Illinois, 351 U.S. 12, 25-26 (1956). For a close dissection of the *Mapp* case looking for clues of possible intention, and concluding that the evidence is inconclusive, see Bender, *The Retroactive Effect of an Overruling Constitutional Decision*, 110 U. Pa. L. Rev. 650, 660-71 (1962).

194. 367 U.S. 643 (1961).

195. 338 U.S. 25 (1949).

*States*,[196] the Court had held that the fourth amendment did not require exclusion, even in federal courts, of illegally seized evidence. A civil remedy against the violator was regarded as sufficient sanction for the search and seizure provisions. *Weeks v. United States* reversed this position to recognize a separate constitutional right under the fourth amendment to exclusion of such evidence in federal prosecutions, but the fourth amendment provisions on search and seizure—including the *Weeks* rule—were still not regarded as elements of due process imposed on state courts by the fourteenth amendment. In *Wolf v. Colorado*[197] the Court held that the rudiments of the fourth amendment search and seizure provisions do constitute elements of due process that bind the states, but expressly held that the *Weeks* rule was not constitutionally binding upon the states. Finally *Mapp* did for state criminal proceedings what *Weeks* had done for federal, by holding that the Constitution prohibits admission of evidence obtained in violation of the fourth amendment provisions. Thus in a sense *Mapp* came not to overrule *Wolf's* doctrine but to fulfill it. In a narrower and pragmatic sense, of course, *Mapp* is an overruling decision.

An argument has been made with great persuasiveness that the *Mapp* rule ought not to be applied retroactively in habeas corpus cases. The argument is based upon analysis of the purpose of the *Mapp* rule. One writer has suggested the following criteria for determining the question of retroactive application generally:

> In deciding whether to give a new rule retroactive effect, a court to which the issue properly has been presented first should attempt to identify the purposes of the new rule, next should determine whether on balance those purposes will be served by general retroactive application of the new rule, and finally should decide whether these purposes will be promoted by retroactive application of the new rule in the particular case before it.[198]

In a contemporaneous article, Professor Paul Bender set forth a similar test in language specifically referring to *Mapp*:

> [T]he reason which seems principally to have motivated the Court to exclude unconstitutionally seized evidence from state criminal

196. 232 U.S. 383 (1914).

197. 338 U.S. 25 (1949).

198. Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 942 (1962).

> trials does not appear to apply in general to past trials. If the primary constitutional purpose compelling state exclusion of unconstitutionally seized evidence will not be served by a sweeping reexamination of past convictions, then, especially in view of action taken by the states in legitimate reliance upon *Wolf*—some of it irrevocable—there is no reason not to say that *Mapp*, generally, should be applied only prospectively.[199]

Both versions of the argument are oriented primarily toward the "purpose" of the newly announced rule. Once the purpose is ascertained, at least one author does contemplate that a balancing process of some kind must follow: if the purpose of the new rule can be adequately served by prospective application, and there appears to be any countervailing factor rendering retroactive application unduly burdensome, the rule ought not to be applied retroactively.[200] Both conclude that the exclusionary rule of *Mapp* "is primarily designed to eliminate an encouragement which would otherwise exist for police to ignore constitutional limits upon their conduct, thus protecting everyone, guilty and innocent, from improper searches by tending to make them fruitless no matter what is discovered."[201] Thus, it is argued,

> a court deciding the issue of retroactivity of the *Mapp* rule should ask: Would the release from prison of every person whose conviction was based upon illegally seized evidence have any effect in deterring unconstitutional searches? Assuming a finding of some deterrent effect, would it be substantial enough to outweigh the undesirability of reversing the convictions of many assumedly guilty prisoners?[202]

This undesirability arises not only from the obvious source, the release of apparently guilty prisoners, but also from substantial impairment of values of more general relevance. Retroactive application of the *Mapp* rule in habeas corpus cases would, to some extent, clog the channels of judicial administration, requiring many hearings to determine whether past convictions were based on evidence seized in violation of the rule—a matter that often will not appear of record in pre-*Mapp* convictions.[203]

199. Bender, *supra* note 197, at 660.

200. Note, 71 YALE L.J. 907 (1962).

201. Bender, *supra* note 197, at 660-61.

202. Note, 71 YALE L.J. 907, 942 (1962).

203. See Bender, *supra* note 197, at 655:

> If *Mapp* should be applied broadly to previous trials through these remedies, it is difficult to say why almost every state prisoner in an 'admission' state who

It is likely that in many cases reprosecution of the prisoner will be impossible or difficult because of the unavailability, years after the alleged crime, of evidence and witnesses, and possibly because of jury reluctance to impose punishment on state facts.[104] Wholesale release of apparently guilty prisoners may also have an undesirable effect on the law-enforcing institutions generally; morale of enforcement personnel and public respect for the efficacy and certainty of punishment would be diminished.

Both authors resolve the balance in favor of denying retroactive effect to the *Mapp* rule in habeas corpus cases.[205] Four of the circuits have joined in this resolution.[206] Two, or possibly three, have rejected it.[207] The question is presently pending on certiorari in the Supreme Court.[208]

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has been convicted through officially obtained nontestimonial proof cannot in good faith demand at least a hearing to determine how that proof was obtained—to determine, for example, whether there was sufficient cause to make a search or an arrest preceding a search.

204. Consider in this connection these remarks made about *Gideon*:

> Indeed, those prisoners who have committed the more serious crimes and who are thus serving the longer sentences may be the primary beneficiaries of our ruling. Because they have been incarcerated for a longer period and in view of the fact that more time has thus elapsed since the commission of their crime, it will be the hardest to retry precisely those offenders who, in the interests of an ordered society, should least be permitted to remain at large.
>
> Finally, the District Courts may find it difficult to determine whether those tried in the remote past were indeed denied the assistance of counsel. Records may be stale, incomplete, or missing, and it may hence be difficult accurately to reconstruct events at prosecutions long ago and far away.
>
> These prospects are deeply disturbing. Here, however, the fundamental nature of the right protected by Gideon v. Wainwright and the injustice attendant upon the continued imprisonment of those defendants who have been denied representation by counsel at an important stage of a criminal prosecution, have precluded the limitation of Gideon to prospective application.

United States *ex rel.* Durocher v. La Vallee, 330 F.2d 303, 312-13 (2d Cir.), (en banc; opinion per Kaufman, J.), *cert. denied*, 377 U.S. 998 (1964).

205. Bender, *supra* note 197; Note, 71 YALE L.J. 907 (1962).

206. United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *cert. granted*, 377 U.S. 930 (1964) (No. 1125, 1963 Term; renumbered No. 95, 1964 Term); Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963); United States *ex rel.* Angelet v. Fay, 333 F.2d 12 (2d Cir.), *cert. granted*, 379 U.S. 815 (1964) (No. 578); Sisk v. Lane, 331 F.2d 235 (7th Cir. 1964).

207. United States *ex rel.* Campbell v. Rundle, 327 F.2d 153 (3d Cir. 1964) (dictum); Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963); Hall v. Warden, 313 F.2d 483 (4th Cir.), *cert. denied*, 374 U.S. 809 (1963); California v. Hurst, 325 F.2d 891 (9th Cir. 1963) (applying same test as cases cited in note 206 *supra*, but with contrary result).

208. Linkletter v. Walker, 377 U.S. 930 (1964) (No. 1125, 1963 Term; renumbered No. 95, 1964 term); United States *ex rel.* Angelet v. Fay, 379 U.S. 815 (1964) (No. 578).

I cannot agree with the starting point of this approach to the problem. It purports to be a pragmatic approach, seeking the result that will further to the maximum extent possible the "purposes" or "interests" that are at stake. But it limits itself to the "purposes" of the newly announced rule, and to the "interests" of the judicial and law-enforcing institutions. It fails to take account of the other values that are affected by departure from precedent. And other values are uniquely affected when rules that govern punishment for criminal conduct are changed. No Blackstonian conceptualism is required to identify values demanding that a new and higher standard of due process be applied retroactively. For what Blackstonian conceptualism does is to apply to legal judgments an assumption that we do in fact commonly make with regard to ethical judgments: that they are of universal and eternal validity. In the older common law tradition from which Blackstone derived his legal ideology, this seemed unquestionable because common law was identified with natural law, and both with "the perfection of reason."[209] Today, of course, our claims for judicial decisions are much less ambitious. We recognize that natural law "was guilty of the Duchess' fallacy in *Alice in Wonderland*: it insisted that everything must have a moral in a universe full of the irrelevant, the inane, the neutral, the fatuous, and the frolicsome."[210] But when we move from applications of substantive law to applying more distinctively ethical notions such as "justice," "the rule of law," "due process," and "fundamental rights," we tend even today to assume that our propositions in these areas are universally valid—or at least to speak and act as if they were. And whether or not this tendency is philosophically justifiable, it has the undoubted result that inequalities in the application of such propositions will offend our sense of justice much more deeply than unequal application of more everyday legal propositions. In practical terms, this means that any new determination of the requirements of "due process" will prima facie be expected to apply to all trials whatsoever, even when these are long past. In short, the values of equality and the image of justice are thrown into special prominence by any new rule of due process, and by *Mapp* no less than by *Gideon v. Wainwright*[211] or *Griffin v. Illinois*.[212] Any attempt

209. See Sir Edward Coke in 1 Co. Litt. 97b, and in Calvin's Case 7 Co. Rep. 1a, 19a, 77 Eng. Rep. 377, 399 (K.B. 1608). On the Blackstonian history see Boorstin, The Mysterious Science of the Law 25-30, 120-38 (Beacon Press ed. 1958); Cahill, Judicial Legislation 9-10 (1952). See also notes 7-8 *supra* and accompanying text.

210. Cahn, The Sense of Injustice 12 (1949).

211. 372 U.S. 335 (1963).

212. 351 U.S. 12 (1956).

at a solution to the problem of retroactive application of *Mapp* in habeas corpus cases that fails to take these values into account falls woefully short of adequacy.

I am willing to concede that retroactive application of the *Mapp* rule in habeas corpus cases would considerably impair the values of stability, judicial efficiency, and (in a sense)[213] protection of reliance upon perceived law. But this is true of retroactive application on habeas corpus of all the other decisions expanding due process protections of criminal defendants,[214] and certainly does not justify any *ipse dixit* conclusion that any of these rules may properly be ignored in habeas corpus proceedings. It seems clear that the values of equality and the image of justice forbid this. In the *Mapp* situation the question is whether the same values require the same result.

First of all, it appears that the value of equality is impaired to some extent by refusal to apply *Mapp* retroactively, whether on habeas corpus or when a pre-*Mapp* conviction is reviewed directly on appeal, for the obvious reasons that *Mapp* embodies a rule, whatever its ethical content, and that there is no relevant differentiating factor to justify treating one accused person differently from another in this respect. The main thrust of the argument against applying *Mapp* retroactively on habeas corpus appears to recognize this, but to regard the denial of equality as irrelevant or unimportant because the purpose of the *Mapp* rule is said to be exclusively deterrence of the condemned methods of obtaining proof of guilt. The point appears to be that the freedom from interference that is protected by this institutional restraint is not the individual interest of the accused person, but the interest of society at large. In this the *Mapp* rule is said to differ from the other expansive due process interpretations. The argument does not deny that equality is to

213. Protection of societal reliance on perceived law is, it seems to me, indistinguishable from the institutional value of stability.

214. There are variations in the extent to which stability will be impaired, however. Thus retroactive application of Griffin v. Illinois, 351 U.S. 12 (1956) on habeas corpus might require only that the prisoner be released unless he is given a free transcript and an appeal, rather than a full reprosecution. Retroactive application on habeas corpus of Gideon v. Wainwright, 372 U.S. 335 (1963), or Escobedo v. Illinois, 378 U.S. 478 (1964), on the other hand, like retroactive application on habeas corpus of *Mapp*, would necessitate reprosecution, which well may be impossible as a practical matter. In one respect only would the *Mapp* rule have more devastating effect on stability than any of the others. Past resort to unconstitutional searches and seizures would render crucial evidence—perhaps the state's only evidence—inadmissible at the reprosecution, and thus effect a somewhat broader frustration of the law-enforcing institution than past denials of right to counsel or other due process rights if retroactively condemned via habeas corpus.

some extent impaired by refusal to apply *Mapp* retroactively; it asserts, rather, that the impairment is of small gravity because the rule only accidentally and collaterally produces the release of convicted defendants. Thus, according to the argument, the image of justice is not seriously damaged by refusing to apply the rule to past convictions on habeas corpus.

I think that this argument raises afresh the problems of separation of powers and the permissible scope of judicial power. While I think it perfectly obvious that courts must and should "make" law, and that they can do it better and more fairly if permitted the technique of prospective limitation, I do not think this means that courts should avail themselves of every other tool in the legislative kit-bag. Consider, in this light, the double-edged social problem involved in the *Mapp* case. A legislative body has access to various ways to deter police from improper invasions of privacy. Criminal liability could be imposed, as could civil penalties, reduction in rank, loss of seniority, or perhaps dismissal. Any of these means might be adopted without creating any private right, either to compensation in damages or to exclusion of evidence so obtained in a criminal trial of the victim of the wrongful invasion.

A court does not have such a wide choice. It does not generate duties or regulations of police conduct in the abstract. It recognizes rights that are enforcible in litigation before it. It may, and I think it should, postpone recognition or enforcement of a right, and of its corresponding duty, in circumstances where the relevant values are aligned to demand prospective limitation. But the thesis advanced in support of prospective limitation of the *Mapp* rule is essentially that it was never intended to create any right, but only to produce a duty, only to regulate police conduct. The constitutional right the Court appears to have recognized, the argument implies, was produced only to permit the Court to promulgate a more effective restriction on police practices. I suggest that here is a line courts should not—and the Supreme Court in *Mapp* did not—cross, a line that marks the outer limit of judicial, as distinguished from legislative, power. I do not believe that the Court should, or would, attempt to deal in duties not otherwise enforceable before it by manufacturing bogus private constitutional rights. Yet the "deterrent purpose" interpretation of the *Mapp* decision necessarily implies that no criminal defendant—whether before or after *Mapp*—has any genuine interest or right, much less

a constitutional right, to the protection against conviction on the basis of illegally seized evidence afforded by the *Mapp* rule.

The only theory that might be urged to legitimate the "deterrent purpose" interpretation of *Mapp*, and thus leave the door open to refusal to apply *Mapp* retroactively without doing violence to a fundamental private constitutional right, ethical in content, is one which would regard the *Mapp* rule as not recognizing any unique constitutional right to exclusion of unconstitutionally seized evidence, but rather as recognizing standing in Miss Mapp to assert a right to be free from unconstitutional searches and seizures secured by the fourteenth amendment to all persons. Viewed in this light, Miss Mapp's case provided the Court with an opportunity to adopt the most effective means of protecting the constitutional right that every person—whether innocent or guilty of crime—enjoys under the fourth amendment. But constitutional rights are personal rights. And the Court in *Weeks* recognized that a constitutional wrong was done Weeks by the court which admitted the illegally seized evidence.[215] In such a situation the wrong does not end with the seizure. The seizure of the evidence and its use are all of a piece, a single course of unconstitutional action, a single instance of lawless law enforcement. The violation of Miss Mapp's constitutional right, no less than the violation in *Weeks*, consisted in retention and use of the seized property as well as its seizure, and continued until the property was returned and all effects of the seizure were expunged. As was said in *Weeks*,

> [T]he letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; . . . there was involved in the order refusing the application [for their return] a denial of the constitutional rights of the accused, and . . . the court should have restored the letters to the accused.[216]

If there is a constitutional right to the only effective correction of this constitutional wrong—the return, unused, of the property—it seems clear that the probative value of the property as evidence against the accused is irrelevant to his overriding constitutional right.

*Mapp*, like other decisions expanding the concept of due process in the same area, should be viewed as simply recognizing a constitutional right—here, a right to the exclusion of unconstitutionally obtained evi-

215. Weeks v. United States, 232 U.S. 383, 398 (1914).
216. *Ibid.*

dence. Certainly *Mapp* seems to have more in common with these other decisions than it has to set it apart. Any view that a rule such as that announced in *Gideon v. Wainwright*,[217] for example, is exclusively or even primarily concerned with the possibility of erroneous convictions under a practice recognizing a less extensive right to counsel seems mistaken. The prevailing practice under *Betts v. Brady*[218] already invalidated similar convictions upon the showing of any possibility of prejudice resulting from denial of right to counsel.[219] The burden of *Gideon*, then, is essentially that prejudice is immaterial. A prosecuting government might conclusively establish the absence of any possibility of prejudice, and prove guilt beyond any shadow of a doubt, yet still the convicted defendant's fundamental constitutional rights have been violated, and he must be released and reprosecuted according to the constitutional ritual if punishment is to be imposed. In light of the values discussed throughout this Article, a change like that in *Gideon* should be given retroactive effect, and the Supreme Court has done so.[220]

I do not think that *Mapp* stands on any significantly different footing from *Gideon*. In *Mapp*, it is true, the right is not in any way derived, as it is in *Gideon*, from unreliability of the condemned practice as a determinant of guilt, but it is a right that has similarly been accorded constitutional stature, and the rule, like the rule of *Gideon*, has been recognized as part of the constitutionally required ritual that must precede imposition of criminal punishment. As Professor Fuller has put it, due process is required "not merely to protect the innocent person against the possibility of an unjust conviction, precious as that objective is. The purpose . . . is to preserve the integrity of society itself. It aims at keeping sound and wholesome the procedures by which society visits its condemnation on an erring member."[221]

Whatever may be said of the constitutionally required ingredients of a "sound and wholesome" criminal procedure, it seems to me that they are obviously more comprehensive than a single requirement that has to do with reliability of determinations of guilt. Science may yet devise a satisfactorily or totally reliable lie-detecting device, but its reliability would not cure the constitutional deficiency of a criminal procedure that

217. 372 U.S. 335 (1963).
218. 316 U.S. 455 (1942).
219. See Harlan, J., concurring in Gideon v. Wainwright, 372 U.S. 335, 350-51.
220. Eskridge v. Washington State Bd., 357 U.S. 214 (1958).
221. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 35, 37 (Berman ed. 1961).

imposed the device on unwilling defendants. There was nothing unreliable, for example, in the narcotics capsules retrieved by the police from Mr. Rochin with a stomach pump,[222] but reliability did not render the procedure acceptable in the ritual of imposing criminal punishment. Of course the *Rochin* decision had some impact on future police practices, but I doubt that Rochin's constitutional right would have been less even if California had already had strong statutory measures to deter the condemned police practice by denouncing it as criminal or discouraging it in other ways.

So it is, I think, with *Mapp*. The interrelated societal interests in the liberty of the individual and in the integrity of the law-enforcing institutions must not be lost sight of. The *Mapp* decision seems to me to represent a meshing of these interests. If one accepts this understanding of *Mapp*, it becomes at once apparent that invalidation of the *Mapp* conviction was at once a remedy for the invasion of Miss Mapp's constitutional right and an appropriate measure to weed out an excess in the administration of criminal law, to maintain the integrity—the soundness and wholesomeness—of the criminal law-enforcing institutions at a constitutionally acceptable level.

It thus seems clear that the *Mapp* decision is inadequately explained by reference solely to its deterrent effect. Miss Mapp had a constitutional right to a "fair" trial, and trial fairness is not exclusively a matter of intrinsic accuracy in the determination of guilt or innocence. Her right had been violated, and the integrity of the state criminal law-enforcing institution impaired, by a failure to observe one of the requirements of due process. Both wrongs could be redressed only by invalidation of her conviction. To the extent that it is sound, the *Mapp* rule is essentially ethical in content, no less than the rule in *Gideon*, and thus implies a claim that it has always been sound. Miss Mapp's restoration to her own status quo ante under compulsion of the fourteenth amendment implies that every person whose constitutional right not to be convicted on the basis of unconstitutionally obtained evidence has been similarly violated—at whatever time—should also be restored to his own status quo ante. And the integrity of law-enforcing institutions—which are judicial institutions—requires the same result. It is this, rather than callous unconcern for the values of stability and efficiency of our judicial institutions, that has led the Court to apply its current conception of constitutionality retroactively—sometimes on appeal, sometimes on habeas corpus—in other cases involving the imposition of

222. Rochin v. California, 342 U.S. 165 (1952).

criminal punishment. The values of stability, certainty, and judicial efficiency have been involved in varying degrees, depending largely upon whether direct review or habeas corpus was being sought. But in all the cases, whether on appeal or habeas corpus, the value of equality and the image of justice demanded retroactive application. If the writ of habeas corpus were not statutorily available to reach persons who are currently imprisoned on the basis of criminal prosecutions that are deficient by present constitutional standards, I am led to wonder if the Constitution would not supply the omission. But since the statute is available, I cannot imagine that it should be judicially fenced off to perpetuate the effect of past excesses of criminal law administration currently subjected to constitutional condemnation.

The Court's decisions elevating the standards of criminal due process have these two things in common: They are judicial decisions, rather than legislative enactments. And they alter not our everyday substantive or mechanically procedural law, but rather the fundamental law that we hopefully, perhaps naively, but in any event relentlessly, regard as embodying principles of universal application, as good for yesterday as for tomorrow, for the poor untutored Indian as for a Blackstone, Coke, or Pound.

A legislative body might give or take away some additional procedural protection, or change a rule of substantive law, and do so prospectively only. Equality would be impaired, and yet no great outcry would be evoked. Courts may properly, and in fact have, also limited newly announced rules to prospective application. But a court is not primarily a law-making institution. It must resolve disputes, and in a way not too offensive to the onlookers. Prospective limitation by judicial decision is acceptable only when the values of equality and the image of justice are not too seriously at stake; and the image of judicial justice is different from that of legislative justice. But even a legislative body would be turned out if it enacted into law a prosposition for which it claimed universal truth and withheld the beneficence for future generations.